William M. Darlington

REPORTS OF CASES

IN THE

County Courts of the Fifth Circuit,

AND IN THE

HIGH COURT of ERRORS & APPEALS,

OF THE

STATE OF PENNSYLVANIA,

AND

Charges to Grand Juries

OF THOSE

COUNTY COURTS.

By ALEXANDER ADDISON,

PRESIDENT OF THE COURTS OF COMMON PLEAS OF THE FIFTH CIRCUIT OF THE STATE OF PENNSYLVANIA.

WASHINGTON:

PRINTED BY JOHN COLERICK, AND MAY BE HAD OF THE BOOKSELLERS IN PHILADELPHIA.

1800.

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ADVERTISEMENT.

IT is not for me to ſay how many or what are the Faults of the following Notes. What I conſider as moſt incumbent on me to mention is, in ſome Caſes, the Imperfection, and, in ſome Caſes, the Omiſſion of the Statement of the Arguments of Counſel.

The Obſervations from the Bench, in the Courſe of a Trial are taken from haſty Notes made by me at the Time. Opinions on Law Points, formed on greater deliberation, are taken from the Notes of thoſe Opinions drawn up for Delivery.

Deciſions being Conſtructions of the Law, it is of Importance, that they be known; and it ſeems to me, that the Legiſlature ought to promote their Publication. This might be done if the Governor were authorized to purchaſe ſuch a number of Copies of the Deciſions of the ſeveral Courts, as would defray the Expence of Publication, and diſtribute them, as the Laws are diſtributed. Some qualified

Perſon might thus be induced to collect and publiſh the Deciſions of the ſeveral Courts. To ſet an Example of this, I am willing to riſk Reputation of Skill by what may perhaps be deemed a premature Publication of the following Notes. If Deciſions were generally publiſhed, the Errors of one Court would be corrected by the Accuracy of another, and uniformity be accompliſhed.

The Acts of Congreſs 1 U. S. L. or 2 U. S. L. cited refer to the Edition in two Volumes, printed by E. Oſwald; 3 U. S. L. to the Pamphlets printed by F. Child and J. Swaine; and 4 U. S. L. to the Pamphlet printed by F. Childs. The Acts of Aſſembly St. L. are cited from Mr. Dallas's Edition of the Laws of this State.

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REPORTS OF CASES, &c.

ALLEGHENY COUNTY,

September Term, 1791.

PENNSYLVANIA *v.* SUSANNA M'KEE.

1791.

SUSANNA M'KEE, a widow, was tried for the murder of her baſtard child. The infant was found dead in the *Monongahela* river, on the 15th *Auguſt* laſt, with a ſtone to it, its head bruiſed, and marks of violence. This woman was ſuſpected and examined: at firſt ſhe denied, but afterwards confeſſed, having had a child.—She ſaid ſhe had buried her child, it having been dead born. Afterwards owned ſhe had taken it up, and thrown it in the river. One witneſs for the priſoner (a man ſuſpected as the father of her child) proved, that, three months before its birth, ſhe applied to him, when he was going out of the neighbourhood, to enquire for a nurſe, and ſend to her, as ſhe did not want the child to be in the neighbourhood; and that ſhe afterwards ſent to know, whether he had found one. He never enquired.

Brackenridge and *Young* for the priſoner, read act of *September*, 1786. 2 *Hawk.* 438. 2 *Hale*, 289.

PRESIDENT. The 8th ſection of "the act for the advancement of juſtice, and more certain adminiſtration thereof," paſſed in 1718, declares, that if any woman delivered of a baſtard child "endeavour privately, by drowning or ſecret burying thereof, or any other way, ſo to conceal the death thereof, as that it may not come to light, whether it were born alive or not; except ſuch

31ſt *May*, 1718. 1 *St. L.* 135.

1791. mother can prove by one witneſs, that ſuch child was born dead, ſhe ſhall ſuffer death, as in the caſe of murder:" thus making concealment of its death evidence of ſuch dead child being born alive, and killed by its mother. This law is borrowed from *England*; and there, as it favoured of ſeverity, it became uſual, in trials for this offence, to require ſome ſort of preſumptive evidence, that the child was born alive, before the other conſtrained preſumption, that the child whoſe death was concealed, was therefore killed by the mother, was admitted to convict her on this ſtatute. And this practice of the *Engliſh* courts was expreſsly eſtabliſhed as the law of *Pennſylvania*, by "the act for amending," and "the act to reform the penal laws of this ſtate," paſſed in 1786, and in 1790, which declared that this concealment ſhall not be ſufficient evidence, to convict the mother, without probable preſumptive proof that the child was born alive.

Kel. 32.

4 *Comm.* 198.

15 *Sept.* 1785 § 9.

5 *April*, 1790 § 6.

2 *St. L.* 804.

To ſupport this indictment, therefore, there muſt be, firſt, poſitive evidence of the concealment, then probable evidence of the birth alive. Or, if there be no evidence of concealment, it may be left to the jury on the circumſtances, if they warrant it, to ſay, whether ſhe murdered the child, by wounds, &c. or not.

2 *Hale*, *P. C.* 289.

Concealment, as the negative of publication, admits only of ſuch proof, as other negatives. But here ſpecial acts of concealment, as private burying, or drowning are pointed out by the law, and proved by the teſtimony. But, as concealment of death may be occaſioned by accident, without any deſign, unleſs there be a concealment of pregnancy, labour, &c. or ſome other circumſtances of concealment, there being no perſon preſent at the birth is not ſufficient, to convict the mother.

2 *Hale*, 289. 2 *Hawk.* 438 *Kel.* 32—3.

Concealment is ſufficiently proved. The circumſtance of the nurſe, three months before, and *at a diſtance from the neighbourhood*, conſidered as countervailing it, ſeems very weak. There is no diſcovery or notice to the neighbours; no call on any of them. She certainly intended to conceal. That intent the law views in a capital light; and reaſonable ſuſpicion will not view it as innocent.

Preſumptive evidence of the birth alive is ſufficient. Want of hair, nails, &c. or other circumſtances of a

premature birth, muſt be evidence in favour of the priſoner. Circumſtances of maturity, marks of violence, &c. are evidence againſt her. You will conſider, whether the marks of violence were inflicted of purpoſe on the child, or by accident to the dead body in the river. The preſumption ought to be ſuch, as, together with the ſtrength of the temptation, and the circumſtances of the mind and conduct of the priſoner, will induce you to believe, that the child was born alive, and killed, by the act, procurement, or wilful neglect of the mother whoſe caſe is now before you. 1791.

The jury found a verdict, not guilty.

NOTE—The 8th ſection of "the act for the advancement of juſtice," &c. on which this indictment was founded, is copied from the *Engliſh* ſtatute, 21 *Ja.* 1. c. 27. At a gaol delivery for *Newgate*, 16 *Car.* 2, *Anne Davis* was tried on this ſtatute, for the murder of her baſtard child, and the indictment not being ſpecial, as the ſtatute is, for concealing the death; but "that ſhe brought forth a living male child, which, being born alive, was a baſtard," and then ſtating, in the ordinary form, that ſhe murdered it, concluded "againſt the peace," &c. without ſaying againſt the form of the ſtatute; the judges doubted whether the indictment ought not to have been ſpecial. Examining the precedents they found a ſpecial indictment in 2 *Car.* 1, but all after 4, 5, and 6 *Car.* 1, framed as that before them. And they were told, that this form was adopted, by the advice of the judges at that time; the ſtatute making the mother's concealment of the death of her baſtard child, puniſhable as murder, which was an offence at common law. This enquiry and information ſatisfying the court, they proceeded on the indictment. And this form of indictment for murdering a baſtard child, comprehending alſo an aſſertion of ſecret birth and killing, continued to be conſidered, as an eſtabliſhed ſpecific indictment for concealing the death of a baſtard child, the offence declared by the ſtatute to be puniſhable as murder. If the indictment was in this form, and evidence given of concealment, the mother muſt prove by one witneſs that the child was born dead. If the indictment ſtate not that the child was a baſtard and born, alive, ſhe is not put to this proof. The ſame form was adopted in *Pennſylvania*, as a ſpecific indictment for the ſame offence, under our act of 1718; and

1 *St. L.* 135.

Kel. 32.

2 *Hale*, 288—9.

1791. continued to be ſo under our act of 1786 and of 1790, which, beſides concealment of death, required additional preſumptive evidence of birth alive.

2 *St. L.* 364. 3 *St. L.* 599. In 1794, the aſſembly of *Pennſylvania*, by "the act for the better prevention of crimes, and for aboliſhing the puniſhment of death in certain caſes," diſtinguiſhed murder into two degrees, and reſerving the puniſhment of death for murder in the firſt degree, changed the puniſhment of murder in the ſecond degree into confinement for a period not leſs than five years. And, with reſpect to the offence of concealing the death of a baſtard child, formerly puniſhed, as murder, with death, the 17th ſection of this act declares, that if any woman endeavour privately to conceal the death of her baſtard child, ſo that it may not come to light whether it was born dead or alive, or whether it was murdered or not, ſhe ſhall be puniſhed by confinement for a period not exceeding five years, or by fine and impriſonment, at the diſcretion of the court; and further provides, that if, together with this offence, the indictment charge the woman with the murder of her baſtard child, the jury may acquit or convict her of both offences or either. The 18 ſection then declares, that the concealment of the death of any ſuch child ſhall not be concluſive evidence, to convict the mother of the murder of her child, "unleſs the circumſtances attending it be ſuch, as ſhall ſatisfy the mind of the jury, that ſhe did wilfully and maliciouſly deſtroy and take away the life of ſuch child."

600, § 2, 4.

606, § 17.

§ 18.

2 *St. L.* 364. "The acts of 1786 and 1790," declared, that concealment of the death was not ſufficient to convict, without preſumptive proof of birth alive. And this act of 1794, renders evidence both of birth alive and concealment of death, inſufficient to convict; unleſs there be circumſtances of wilful murder. This is an important alteration of the act of 1718, and in fact, ſeems altogether to deſtroy the force of the 8th ſection of that law, except as to the form of the indictment under it. For, though that ſection had never exiſted, if a mother had been indicted for the murder of her baſtard child, and proof had been made, that ſhe concealed its death, and probable preſumptive proof, that the child was born alive, and if the circumſtances ſatisfied the mind of the jury, that ſhe did wilfully and maliciouſly take away the life of ſuch child (and on an indictment for murder at common law, all this evidence is admiſſible) the jury muſt have convicted her of murder. If, therefore, on an indictment at common law for murder, before the

3 *St. L.* 599, 606.

1 *St. L.* 135.

act of 1718, ſuch evidence as the act of 1794 requires had been ſufficient to convict, the duty of the jury to convict, on an indictment for the murder of a baſtard child, ſeems now to ariſe, not out of the 8th ſection of the act of 1718, but out of the common law; and a mother, indicted for the murder of her baſtard child, ſeems to be in a ſituation neither worſe nor better, when indicted under this ſection of the act of 1718, or for murder at common law. If the 8th ſection of the act of 1718, reſtrained as it is by the 18th ſection of the act of 1794, anſwer no other purpoſe than the common law, its uſe ceaſes, and it might be repealed. If, therefore, it had been the intention of the act of 1794, to make concealing the birth and death of a baſtard child a ſpecific offence, diſtinct from murder, and not alſo leave it, as it was before, a component part of the offence declared by the act of 1718, and ſtated in the indictment as murder, the plain way to accompliſh this intention was, firſt, to repeal the 8th ſection of the act of 1718, and then declare the offence and puniſhment of a mother concealing the birth and death of her baſtard child. But, inſtead of this, the act of 1794 firſt changes the puniſhment of a mother concealing the birth and death of her baſtard child (as it does of murder in the ſecond degree), from death to confinement; then qualifies the 8th ſection of the act of 1718, by declaring certain circumſtances neceſſary to make concealment concluſive evidence of murder, and repeals no law not repugnant to, or ſupplied by itſelf. So qualified, the 8th ſection of the act of 1718 is recognized by the act of 1794; and the eſtabliſhed form of indictment under the act of 1718 and the ſubſequent acts is alſo recogniſed, and may be accompanied with a ſpecial count, for concealing the birth and death.

1791.

3 *St. L.* 606, § 19.

3 *St. L.* 606, § 17.

Whether, ſince the act of 1794, there be much uſe in retaining the form of indictment eſtabliſhed under the act of 1718, may, as I have ſtated, appear doubtful; and it may ſeem, that an indictment for murder at common law may anſwer all the purpoſes of this form of indictment on this ſtatute. But as the act of 1794 ſeems to ſanction this form of indictment; and there may be conceived ſome force in the words "one witneſs," in the act of 1718, and in the words, "concluſive evidence," in the act of 1794; it ſeems adviſeable, to retain this form of indictment againſt a mother, for the murder of her baſtard child, as a notice, to prepare to encounter the evidence of concealment, by the proof of one witneſs, that the child was born dead.

2 *Hale, P. C.* 288—9.

1791. There may, therefore, now be three counts, in an indictment founded on the death of a baſtard child:

1. A count at common law, for the murder of a child.

2. A count, in the form ſettled under the ſtat. 21 *Ja.* 1. and the 8th ſection of our act of 1718, for the murder of a *baſtard* child, by its *mother*; and,

3. A count for the *concealment* of the birth and death of a baſtard child by *its mother*, ſpecially framed, on the 17th ſection of the act of 1794.

I do not know that the firſt is *neceſſary*, as the ſecond is ſo framed, as to accompliſh the ſame purpoſe. On the ſecond count, as other than a count at common law, there muſt be proved, *First*, by the act of 1718, concealment of the birth and death; *Second*, by the act of 1790, probable preſumptive proof of the birth alive; and *Thirdly*, by the act of 1794, circumſtances to ſatisfy the mind of the jury, that the mother wilfully took away the life of her child: and then, unleſs ſhe can deſtroy the effect of this evidence, by the proof of one witneſs, or circumſtances equivalent, ſhe will be convicted of murder. Or, under this count, as a count at common law, if there be no concealment proved, it may be left to the jury on the circumſtances, as at common law, to enquire whether ſhe murdered it or not. Under the third count, there is nothing more to be proved, but concealment of the birth and the death, as ſtated in the 17th ſection of the act of 1794; and, on conviction on this count, judgment is given, as preſcribed by that ſection.

2 *Hale*, 289.

I think, therefore, indictments againſt a mother, on the concealment of the death of her baſtard child, ought now to contain, at leaſt, thoſe two laſt counts; the count for the murder of her baſtard child, as ſettled under the ſtat. 21 *Ja.* 1. and our act of 1718; and (for even ſtrong circumſtances of actual killing may not ſatisfy the jury), a count framed on the words of the 17th ſection of the act of 1794, for the concealment of the birth and death of her baſtard child.

But if from ſtrong circumſtances of wilful and malicious taking away of life, no count of this laſt kind ſhould be drawn up, and the preceeding count, for the murder of a baſtard child, as ſettled under the ſtatute 21 *Ja.* 1. and our act of 1718, ſhould ſtand alone in the indictment; and the circumſtances of wilful killing ſhould not ſatisfy the mind of the jury, and they ſhould not find the murder, but find ſpecially a concealment of the birth and death in the terms, of the 17th ſection of the act of 1794; could judgment

be given according to that ſection, for confinement for not more than five years? 1791.

Concealment of the death of a baſtard child was not firſt declared an offence, by the act of 1794; but at the time of paſſing that act, and at all times before, ſince the act of 1718, was an offence.

The act of 1794 does not repeal the 8th ſection of the act of 1718, but changes the puniſhment (of this as of other offences) and adds a new qualification. Concealment, with other circumſtances, may yet be evidence of murder; murder, like concealment without thoſe circumſtances, may yet be puniſhed by confinement for five years; and the act of 1794 ſtill ſuppoſes the form of indictment under the act of 1718 to be uſed. Under that form, concealment of death is an eſſential part of the evidence; for that form was, in fact, conſidered as a ſpecific indictment for the concealment of the birth and death of a baſtard child; and was notice to the mother to prepare to meet evidence of ſuch concealment, and contained words equivalent to concealment of the birth and death.

The puniſhment is changed not from a leſs to a greater, but from a greater to a leſs; and there was more reaſon for a ſpecial notice in the indictment, that evidence of concealment was to be given, when the puniſhment of it was death, than now, when the puniſhment of it is but confinement for five years. If on an indictment in this form, the jury before the act of 1786, had found ſpecially the concealment, in the words of the act of 1718 & of 1794, judgment of death would have been given; if ſo found now, on this form of indictment ſettled for concealment, when the puniſhment of other murders is changed to confinement, may not judgment of confinement be given? 2 *Hale*, 1°9, —90.

The offence, which is found by ſuch verdict, and which, by ſtatute 21 *Ja.* 1, and our act of 1718, was puniſhable by death, and, by our act of 1794, puniſhable by confinement, is a mother's concealment of the birth and death of her baſtard child. Under the ſtatute 21 *Ja.* 1, and our act of 1718, this was the ſettled form of indictment for this offence. When our act of 1786 and 1790 added another circumſtance, probability of birth alive, it remained the form of indictment for concealment ſo qualified. And when the act of 1794 added further circumſtances of wilful taking away of life, it yet remains a form of indictment for concealment ſo qualified. So that now, it is a form of indictment for a mother's *concealment* (which of itſelf was for-

1791. merly capital) of the birth and death, 1, of her *baſtard* child; 2, of her baſtard child *probably born alive;* and 3, of her baſtard child probably born alive and *wilfully deſtroyed.*

See 2 Hawk. 620-621 and caſes there cited.

There are offences compounded of an inferior offence and ſomething more; as petit treaſon, burglary, murder, &c. and, though in ſuch caſes, on an indictment for the leſs offence, the defendant cannot be convicted of the greater; on a verdict for the greater, he may be convicted of the leſs, and receive ſentence accordingly. On an indictment for larceny, the verdict was a playing with falſe dice, and judgment was given for the miſdemeanor.

Leſſer's caſe Cro. Ja. 407. See Foſter's caſe Kelyng 2. Hawk. 3 ſeq. Gro. Car. 3. 6. 1 Hawk. 263.

On an indictment of a ſingle count for an aſſault and battery, the defendant may be convicted of the aſſault only. Homicide by miſadventure, is an unlawful killing by accident. Manſlaughter is an unlawful voluntary killing without malice. Murder is an unlawful killing with malice. On an indictment for murder, the defendant may be convicted of manſlaughter, or of homicide by miſadventure, &c. This form of indictment is for a murder, conſiſting of concealment of death, and other circumſtances; may not the defendant be convicted of the concealment without the other circumſtances, and receive ſentence accordingly?

This may be thought to be going a great way to ſupport ſuch proceeding; and no doubt the beſt way is to annex, to this form of indictment, a ſpecial count for concealment, in the words of the 17th ſection of the act of 1794. But where, becauſe the concealment was accompanied with ſtrong circumſtances of wilful taking away of life, this has not been done; as I am averſe to the obſtruction or delay of juſtice on mere matters of form, where there is not a manifeſt violation of the plain rules of law or natural juſtice; on a ſpecial finding, in the words of the 17th ſection of the act of 1794, on an indictment under the 8th ſection of the act of 1718, where the mother has had a full opportunity of defence, on the merits of her caſe, I am not convinced that judgment ought to be arreſted.—Why may not judgment be given under the 17th ſection of the act of 1794?

At *January* ſeſſions 1794, a Negroe woman was tried in *Waſhington*, on an indictment for the murder of her baſtard child. The circumſtances were very ſtrong, and might reaſonably have been thought ſufficient, to ſatisfy the mind of the jury, that ſhe did wilfully and maliciouſly take away the life of the child. However, the jury did not find the murder, but found the concealment of the birth and of the death. The court gave judgment of confinement for five years.

See alſo M'Birnie's caſe, poſt.

WASHINGTON COUNTY,

September Term, 1791.

PENNSYLVANIA, *v.* CHARLES SIMMS.

1791.

TWO bonds, each in the penalty of 478*l.* and for the payment of 239*l.* were given by *Charles Simms* to *Alexander Roſs* on 24th *Auguſt*, 1775; one of them payable in two years, the other in three, from the date of the bonds. The property of *Alexander Roſs* being confiſcated by the "act for the attainder of divers traitors," &c. the agents for confiſcated property in *Weſtmoreland* obtained theſe bonds from the perſons in whoſe cuſtody they were left, by *A. Roſs*, and iſſued two foreign attachments, founded on them, by which land of the defendants in the county of *Waſhington* was attached. Special bail was entered in both actions, and payment, with leave to give the ſpecial matter in evidence, pleaded; and now, by conſent, both were tried by the ſame jury.

6 *March*, 1778. 1 *St. L.* 750.

Brackenridge, *Roſs*, and *Woods* for defendant, produced a long ſtatement of facts admitted by Mr. *Ormſby* and Mr. *Galbraith*, agents for confiſcated property: from many of which it appeared, that it had been intended, that this cauſe ſhould be argued, on the ground, that *C. Simms* and *A. Roſs*, having both lived at *Pittsburgh* under the government of *Virginia*, and as citizens of *Virginia*, and never citizens of *Pennſylvania*, this debt was not forfeitable nor attachable by a law of *Pennſylvania*. But the points admitted, on which the caſe was argued, were that the bonds in queſtion were given for land in *Waſhington* county, ſold to *Simms* in 1775, part of a grant by the *Six Nation Indians* to *George Croghan*, who had no other title to it; that this land ſold to *Simms* by *Roſs*, had been ſold by *Croghan* to *Roſs*, who had no other title to it; that the grant from the *Six Nations* to *Croghan* expreſſed, that it was to have no operation within the limits of *Pennſylvania*; that an act of aſſembly of the ſtate of *Virginia* (which had exerciſed a diſputed juriſdiction in *Waſhington* county) paſſed in 1779,

1791. made void all *Indian* grants; and that *Simms* derived no right or benefit by his purchaſe from *Roſs*.

2 *Burr.* 1212. 1 *Bla* 445 1 *Str* 674. 1 *Eq ca.* 84 — *Dall.* 17, 28, 257.

They then read the *Virginia* act of aſſembly above mentioned, the conveyances from *Croghan*, &c. and relied on want of conſideration, and an aſſignee ſtanding in no better ſituation than the obligee.

Bradford for the State. At the time of the purchaſe from *Roſs*, legal titles were not common. Many purchaſed mere improvements, and took their chance of title. Here there was no fraud. If the land had become of great value, *Roſs* could have claimed no more, therefore *Simms* ought to pay no leſs.

PRESIDENT ſuggeſted, that *Simms*, diſclaiming all right to theſe lands under this title, and refuſing to pay the conſideration money, ought, at leaſt, to releaſe this title to the ſtate. Mr. *Simms* immediately offered to do this; but Mr. *Bradford* thought it not worth accepting.

PRESIDENT directed the jury, that, if they thought it the meaning of the parties to buy and ſell a legal title, they ſhould find for the defendant. But if it was their meaning to buy and ſell only a claim or occupancy, which might be beneficial or otherwiſe, they ſhould find for the plaintiff. This is not the caſe of an aſſignee for a price paid for the bond, but like the caſe of an heir or executor of a dead man, who muſt take all the property of the deceaſed with all its incumbrances. Were it the caſe of an aſſignee for full value, our act of aſſembly puts him on the ſame ground with the obligee. Were it otherwiſe, the ſtate, having ſold the land to others, or if to the defendant, for another conſideration (the compact between the two ſtates is a conſideration*) ought not to require payment twice for the ſame property. *Pennſylvania* therefore ſtands in a worſe ſituation, than any other aſſignee; and *Simms* has received no conſideration for theſe bonds. The riſk of a riſe or a fall of the value of the land, is out of the queſtion either way.

There was a verdict and judgment for the defendant.

* It ſeems Mr. *Simms*, deſpairing of holding this land by the *Indian* grant, had ſurveyed ſome of it on a *Virginia* treaſury warrant, and ſo held it under the compact between the ſtates: and the land attached was the ſame land.

WESTMORELAND COUNTY.

October Term, 1791.

Leſſee of GEORGE LATTIMORE *v.* WM. MARTIN.

1791.

THIS caſe had been referred by rule of court to five perſons, on whoſe report, or that of a majority, judgment was to be entered. The report now offered ſhewed, that four of the referees, and both parties, met at the time and place agreed on, and that the parties then agreed to ſubſtitute another in the room of the abſent referee named in the rule. This agreement was then put in writing at the foot of the copy of the rule, ſigned by the parties, and now produced. The report was ſigned by all the referees who heard the caſe; by the four preſent of the referees named in the rule, and the referee ſubſtituted in room of the abſent one.

Woods for defendant, moved to ſet aſide the report, on the ground that not having been made by thoſe only, to whom it was referred, by rule of court, but by four of them and another, whoſe opinion might have influenced the opinions of the four; it did not purſue the ſubmiſſion, and ſo could not be ſupported.

Roſs for plaintiff. The conſent of the parties takes away error, is in writing, and will be part of the record. The number of arbitrators is ſufficient without the name ſubſtituted. This is not an award by act of aſſembly but at common law.

Dall. 314. 2 *Burr.* 701. 2 *Bac.* 225.

PRESIDENT. It is not alledged, that the abſent referee had not notice, nor that there was any fraud or miſbehaviour in the parties or referees; neither is this a motion for an attachment for non-performance, but to ſet aſide an award, in which all is fair on both ſides; nor have the arbitrators exceeded their power, or not purſued the ſubmiſſion; for the ſubmiſſion and their power is from the act of the parties, not of the court. The material point in all theſe caſes ſeems to be the conſent of the parties. The rule of court ſeems to be rather matter of form, to ſecure a fair and effectual execution of the agreement of the parties. The conſent to ſubſti-

1791. tute the referee, in room of the one abſent is in writing, annexed to the copy of the rule, in the preſence of the referees, who were both judges and jury; is recited in the report, and will appear on the record. There is a majority without the abſent referee, and (he having notice) that is enough. The award would be good if the new name were not there. Shall its being there *by the conſent of the parties* make it bad. This conſent ought to be conſtrued as inſerted in the rule; for, in equity, that is conſidered as done, which ought to have been done. What would have been the defendant's anſwer, if this queſtion had been made at the time? The defendant ought not to be permitted to miſlead the plaintiff, by a reference, and now take advantage of his own deceit; and, having had one chance, at pleaſure lay it aſide, when he finds it againſt him, to recur to another.

Church v. Roper, 1 *Rep. Cha.* 140.

NOTE.—In an arbitration, the award was, that a leaſe ſhould be ſurrendered, and, (with conſent of the parties) that certain *other* perſons ſhould ſettle the value of the improvements; the plaintiff, having ſurrendered the leaſe, brought his bill for the value of the improvements, aſcertained by the other perſons. And, though it was objected, that this was extra-judicial, the court of chancery decreed performance; conſidering this as part of the principal award, which the other party had executed. The court of King's Bench refuſed an attachment for non-performance of an award made by an arbitrator ſubſtituted by the real parties (though not the parties on the record) inſtead of the arbitrator named in the rule. But in the caſe of leſſee of *Lattimore* v. *Martin*, no application for an attachment or judgment on the report was made; for Mr. *Woods* having made ſome objection on the merits, and a miſtake of the referees; it was agreed to refer it back to the ſame perſons, who had made the report.

Owen v. Hurd 2 *T. Rep.* 643.—*See* 3 *T. Rep.* 592

ALLEGHENY COUNTY.

December Term, 1791.

James Wright *v.* James Kerr and wife.

1791.

THIS was an action of treſpaſs *quare clauſam fregit*, againſt a huſband and wife, jointly, for taking one hundred buſhels of corn, &c.

Roſs, for the defendants, objected to any teſtimony againſt the huſband; 1, becauſe the writ being againſt the two, as huſband and wife, is to be conſidered in the uſual way of joining the huſband with the wife, for forms ſake, and for his intereſt; and 2, becauſe a wife committing a treſpaſs in the preſence of her huſband, is not anſwerable, acting by compulſion.

Brackenridge and *Carſon*, for the plaintiff: Treſpaſs lies againſt huſband and wife, for a joint treſpaſs by both. *White v. Eldridge*, 1 *Ld. Ray* 443, 1 *Bac. abr.* 3. 7.

PRESIDENT. This is not an action againſt huſband and wife, for a treſpaſs by the wife, but for a joint treſpaſs by both. Though the huſband's preſence ſhould excuſe the wife, the wife's preſence will not excuſe the huſband. The evidence is proper. If the exception be intended againſt the action, there is another way to bring it forward, and give it effect, if it can have any.

Leſſee of Ferguson *v.* Smallman.

MAJOR *Ferguſon*, purchaſed at Sheriff's ſale a tract of land, which was the property of Major *Smallman*, and ſold on judgments againſt him. *Smallman* would not give up poſſeſſion, and an ejectment was brought to this term.

A copy of a declaration with a demiſe, dated after the 4th of *November* laſt, was given to the Sheriff, with a notice, to be ſerved on *Smallman*. Another copy was alſo delivered with a demiſe dated before that day.

1791. Major *Ferguſon* was killed on that day, in General *St. Clair's* engagement with the *Indians*. Only one cauſe appeared on the docquet.

Carſon, for the defendant, producing the copy which ſtated the demiſe as dated after the death of *Ferguſon*, moved to quaſh the proceedings, on that ground.

Brackenridge, for the plaintiff, produced a declaration filed in the office, a copy of which had been ſerved by the ſheriff, ſtating the demiſe before the death of Major *Ferguſon*; and urged—1. Here is a record, with a demiſe in the life time of the leſſor, of which a copy has been ſerved on the defendant. The court will not look farther in favour of an objection obſtructive of juſtice. —2. *Smallman* is eſtopped by his confeſſion of leaſe, entry, &c. from ſaying any thing againſt the demiſe; this confeſſion is a condition of his being admitted defendant.—3. The death of the leſſor does not abate an ejectment, which is the leſſee's action, to recover his term.—4. An ejectment may be brought on the demiſe of a perſon dead, on a leaſe made in his life time, and not expired; this being only deſcriptive of the title queſtioned.

PRESIDENT. Let defendant take nothing by his motion.

WESTMORELAND COUNTY.

December Term, 1791.

PENNSYLVANIA, *v.* WILLIAM ROBISON and ANDREW ROBISON.

1791. AN indictment for a forcible entry and detainer of lands of *Ralph Cherry* was found and tried in the Quarter Seſſions.

Brackenridge and *Roſs*, for the defendant, objected to *Cherry* the proſecutor as an incompetent witneſs to prove the poſſeſſion. *Ex neceſſitate rei*, a proſecutor is admit-

ted to prove the force; but poſſeſſion is a notorious fact, which may be proved by other witneſſes. 1791.

Galbraith, *Woods*, and *Young*, for the proſecutor, declin-d taking up time to anſwer the objection, and called other witneſſes to prove the poſſeſſion.

The counſel for the defendants made three points.—

1. Was *Cherry* in poſſeſſion?

2. Was *Robiſon's* entry forcible? and

3. Was it within three years before the indictment.

1. The ſame poſſeſſion, which is protected from a forcible entry, would ſupport an ejectment. A poſſeſſion of twenty years bars the one, of three years, the other. One may have the poſſeſſion; another, the right of poſſeſſion; a third, the right. Poſſeſſion is enough againſt a wrong doer. In the caſe of the *State*, *v. Hughes*, in a court of Oyer and Terminer in this county, an indictment for a forcible entry on the poſſeſſion of *Powel*, it was proved that *Hughes*, the defendant, had built his cabbin within an hundred yards from *Powel's*. The Chief Juſtice held, that no forcible entry could be made on *wood land*; and *Hughes* was acquitted. Such a poſſeſſion as *Cherry* had would not have entitled him to a recovery in ejectment; and it is not ſuch as a forcible entry could be committed on.

2. and 3. There was no force in the entry; and, if there was, *William Robiſon* has ſince been more than three years in poſſeſſion; and, on every ground, there muſt be a verdict of acquittal.

PRESIDENT. The *poſſeſſion* may be in one, the *right* 2 *Comm.* 195 *of poſſeſſion* in another, and the *right* in a third. One —9. who has entered forcibly may have the poſſeſſion, without either the right, or the right of poſſeſſion, and if he die, and tranſmit the poſſeſſion to his heir, he tranſmits more than he had, for the new poſſeſſor has alſo the right of poſſeſſion, though without the right. Or, in another way, one, who has a patent for land, has the right; his leſſee has the right of poſſeſſion; and one, who illegally ouſts him, has the poſſeſſion. In ejectment, the right, and the right of poſſeſſion come in queſtion. In an indictment for a forcible entry, neither comes in queſtion, but the poſſeſſion only and the force. If one having the right, or right of poſſeſſion, may ſupport an ejectment, it follows not, that he may enter by

1791. force, or that no leſs poſſeſſion than a rightful one, or ſuch as would ſupport an ejectment, is protected from a forcible entry. For, whatever right, either of property or poſſeſſion, the man who makes the entry may have, he muſt not commit a crime in exerting it; and he commits a crime, puniſhable by indictment, if he enter with force, on a perſon having no right, not even of poſſeſſion; and in reſentment of the crime, his right, whatever it may be, though both of property and poſſeſſion, is ſet aſide unregarded by the law, and the perſon forcibly diſpoſſeſſed, though having neither the right, nor the right of poſſeſſion, is taken under the protection of the law, and reſtored to that poſſeſſion, of which he was forcibly deprived. This is done even againſt a man with both the right and the right of poſſeſſion, who, if he had entered peaceably, or demanded it by action, would have attained the poſſeſſion, and been ſecured in it.

A man having both the right, and the right of poſſeſſion, is barred in the poſſeſſory action of ejectment, unleſs he can prove a poſſeſſion within twenty years. And a man who has not even the right of poſſeſſion, in any ſenſe, and has obtained poſſeſſion by violence, againſt all right, will not be diſpoſſeſſed by indictment, if he has been three years in peaceable poſſeſſion: for three years is a bar to reſtitution in this way.

But the compariſon of forcible entry, with ejectment, neither elucidates the ſubject, nor ſupports the cauſe of the defendants. For though poſſeſſion be of ſo light a nature, that, when it comes in competition with title, in a legal diſcuſſion in ejectment, it will not ſtand; it may be a ſufficient occupancy, exerciſe of ownerſhip, uſe, or enjoyment, which will be protected againſt force. The interruption of this poſſeſſion by violence is made a crime, to be redreſſed by indictment. And any argument from poſſeſſion being ſufficient againſt a wrong doer, is againſt the defendants. Very light evidence of poſſeſſion, as a barrel of beer left in a cellar, has been ſufficient in ejectment, to ſet aſide proceedings, as on a vacant tenement. And yet having cattle on the land has been held not a ſufficient poſſeſſion to be protected againſt a forcible entry, by one having the right. But the ground of this ſeems to be, that the crime lies in the force or fear of ſome human being. Though *im-*

Dent v. Sa-vage. 2 *Str.* 1064.

2 *Burns.* 179. 2 *Bac. Abr.* 553.

provement be no evidence of *title*, and has therefore failed againſt title, in ejectment, it may be evidence of *poſſeſſion*, to be protected in a forcible entry. It is not the degree or quantity of poſſeſſion, that conſtitutes the right of poſſeſſion, but the manner, in which the poſſeſſion was obtained; and a poſſeſſor, without the right of poſſeſſion, may be as completely poſſeſſed, as one who unites in himſelf poſſeſſion, right of poſſeſſion, and right, and is equally protected againſt a forcible entry; though he would not recover, or would be turned out in an ejectment. 1791.

There muſt be ſome evidence of poſſeſſion. But I cannot think, that the caſe of the *State v. Hughes*, has been fully ſtated. A man cannot ſtand on every part of his land; he cannot build houſes, and ſettle tenants on every acre of it; he cannot plough every corner of it, nor make a fence round the whole. Binding the inhabitants of this country to rules ſo ſtrict, and protecting, from forcible entries, only lands ſo poſſeſſed, would be very inconvenient, and would, in a great meaſure, if not entirely, elude the law; eſpecially in thoſe caſes, for which chiefly the laws were made, of poor people, leaſt able to circumſcribe their ſurvey on a legal title, to build, plough, or fence. Therefore, if a man, in any manner, circumſcribe for himſelf a reaſonable poſſeſſion, within ſuch bounds, as are uſually allowed; ſit down, on one part of it; build, in ſuch manner as is convenient;—plough and fence, as may ſuit his intereſt, inclination, and ability; and uſe the reſidue of his known and reaſonable claim, as other men of like condition uſe their lands; he will be conſidered as in ſuch poſſeſſion of the whole, that a forcible entry into any one part will be puniſhed by theſe ſtatutes.

2. As to the force in the entry, &c. there muſt be, at leaſt, ſuch acts of violence, or ſuch threats, menaces, ſigns, or geſtures, as may give ground to apprehend perſonal injury or danger, in ſtanding in defence of the poſſeſſion.

3. I cannot ſee how, on the plea of not guilty, you ſhould acquit the defendants, becauſe the forcible entry has been (if it have been) followed by three years peaceable poſſeſſion. If the entry was forcible it was a crime;

1791. and you muſt ſay whether the defendants are guilty or not. Three years peaceable poſſeſſion bars the remedy of reſtitution; but does it juſtify the offence? If the defendants would uſe this, to prevent the award of reſtitution, it muſt come before the court in pleading or in ſome ſuch way, as that it may be put on the record, and not exiſt only in the evidence.*

* The place in diſpute was a remarkable ſpot, known by the name of "*The Indian Fort*," of extraordinary rich ground, about forty perches from the cabbin built by the firſt ſettler, (from whom *Cherry* derived his claim), the trees on it were deadened by him at his firſt ſettlement, and ever ſince known to be within his claim.

FAYETTE COUNTY,

December Term, 1791.

PENNSYLVANIA *v.* JOHN LOVEL, and RACHEL his wife, *alias* RACHEL WHITKEN.

AN indictment for larceny, in ſtealing a ſilver tea-tongs, &c. was found, at this Seſſions againſt *John Lovel* and *Rachel* his wife, *alias Rachel Whitken*. They pleaded ſeparately. The man was firſt tried and acquitted. Then on the trial of the woman.

Roſs, aſſigned counſel for them, urged, 1. There is no crime.

2. If any, it amounts not to larceny, but a miſdemeanor only, in receiving ſtolen goods.

3. Being joined with her huſband, his preſence amounts to coercion, and ſhe is excuſed.

Galbraith, for the State, 1. There is evidence of a crime, and

2. Of the crime laid in the indictment. She is not, in fact, his wife, but only lived with him.

PRESIDENT. Doubtleſs, a crime is proved. Larceny ſeems to be proved. But if you think this crime not proved, you ought to acquit on this indictment.

As to the third point, it is not before you. Indictments are in their nature, joint and ſeveral, as the caſe may be. Though this indictment be againſt both, they have been tried ſeparately; and the parts relating to the one have not been read over againſt the other. It is to you a ſeparate indictment againſt this woman. The preſumption of the man's preſence, from his being joined in the indictment, is contradicted by his acquittal. You have no evidence whether ſhe has a huſband, or whether he was preſent, or not. You have only to decide on the two firſt points. The difficulty, if there be any, in the third point will lie with us. For, if you ſhould find this woman guilty, a queſtion may be made to us, whether ſentence can be paſſed on her for a larceny charged on her jointly with a man ſtated to be her huſband; or, if not on the conviction of both, whether the acquittal of this man will juſtify ſuch ſentence. 1791.

NOTE.—The point ſeems ſettled that judgment may be given on ſuch conviction. However in this caſe there was no occaſion for any deciſion of ours, as the woman was acquitted. 9 *Rep.* 71, 11. *Rep.* 61—2. 1 *Hale P C.* 46. *Woods's Inſt.* 345.

WASHINGTON COUNTY,

January Term, 1792.

ALEXANDER FULTON *v.* WILLIAM IRWIN.

ON a motion to ſet aſide a *testatum ca. ſa.* to *Franklin* county, for want of a preceding *ca. ſa.* to this county, the court did not ſet it aſide.* But on motion they ordered the plaintiff to account for the full value 1792.

* All the decided caſes have given way to the exception, while, at the ſame time, they have held it completely anſwered by the production of an original, notoriouſly taken out, after the motion has been made. Why not as well *Dal.* 313. 2 *Bla. Rep.* 694. 2 *Salk.* 590. 3 *T. Rep.* 383.

1792. of notes, the property of the defendant, taken in execution, and bought by the plaintiff at ſheriff's ſale, for a leſs ſum than was due on the notes.†

overlook the exception at once, and ſave the expence and delay? In this caſe the prothonotary who ſigned the *testatum* had gone out of office, before the motion to ſet it aſide was made.

Ca temp. Ld. Hardw. 3. Dig. of adjuged caſes, 594.

† I know not what has generally been the practice in *Pennſylvania* as to attaching or ſeizing debts. In *England*, it was held that bank notes were not ſeizable.

ANONYMOUS.

ROSS moved for leave to enter judgment on a warrant of attorney to confeſs judgment, for the penalty of a bond exceeding 10*l.* the real debt being under 10*l.* His object was to have it aſcertained before hand, who ſhould pay the coſts.

The court would not interfere; and he did not enter the judgment.

Dall. 308.

NOTE.—I have heard different opinions on this ſubject; and if the caſe of *Cooper v. Coats* was the caſe of a bond with a penalty, there ſeems to be a deciſion againſt giving coſts to the plaintiff. Yet I think there are ſtrong reaſons for ſuppoſing, that judgment may be entered in the court of Common Pleas on ſuch a warrant, where the penalty exceeds, though the real debt is within, the juriſdiction of a juſtice of the peace; and ſuch judgment will carry the coſts of courſe. So alſo if the judgment were by default. The judgment appears for a ſum above the juriſdiction of a juſtice. Till application for relief, from the penalty, the court cannot ſee that this is not the real debt. They will not relieve but on equitable terms, as payment of coſts, &c. The penalty is legally the debt after default; and ſtipulating for a penalty admits proſecution for it, and of courſe promiſes the payment of all coſts neceſſary for its proſecution. The creditor ought to chooſe his juriſdiction; and a delinquent ought to have no favour, that would injure his creditor.

But if the judgment were on a verdict, it would be only for the ſum due.

ANONYMOUS.

BRACKENRIDGE aſked the direction of the court to exhibit a judgment for a penalty, in evidence to a jury of enquiry, whether land will extend or not. 1792.

PRESIDENT. This ſeems a ſtrange motion. The ſeizure of land ſeems ſomewhat analogous to a payment or tender. The court will not ſuffer a plaintiff to receive more on a judgment, than is really due. And the queſtion before the jury is, in what time the profits of the land will diſcharge the debt really due. But we give no direction either way.

ALLEGHENY COUNTY,

March Term, 1792.

PENNSYLVANIA *v.* MARGARET M'GILL and WILLIAM BOGGS.

INDICTMENT for a miſdemeanor. *Boggs* perſuaded *M'Gill* to ſteal, and deliver to him, a conveyance for 100 acres of land executed by *Henry Shaver* to his ſon and daughter. This land was part of a larger tract, of which *Shaver* had been poſſeſſed, under a location or a *Virginia* certificate. He intended this hundred acres as a proviſion for his two children; and having ſold the reſt to *Boggs*, he conveyed the location or certificate to him, that he might take a patent for the whole in his name, and took an article or bond on *Boggs*, to convey this hundred acres to his children, after he obtained the patent for the whole. They were convicted.

The court ſuggeſted, that it might be uſeful, if *Boggs* having the title to this land, ſhould before ſentence, execute a conveyance to the ſon and daughter of *Shaver*. He did ſo—and judgment was given.

JAMES FARNESLY *v.* PATRICK MURPHY.

1792. THIS was an action of *indebitatus aſſumſit* for money had and received. In the year 1785, *Patrick Murphy* bought from *James Farneſly*, an out-lot, improved and occupied by *Farneſly*, of twenty-one acres, near the town of *Pittsburgh*; for which he agreed to pay 40*s.* per acre, if at a certain time thereafter, which was then fixed by the parties, the proprietaries ſhould not have granted a patent or deed for it, to any other perſon. No patent was granted at the time fixed, nor ſome time after, when *Murphy* himſelf was in *Philadelphia*, and might, as he undertook to do, have obtained a patent, in his own name. But *Murphy* procured one *De Byerly* to lend his name, to take out a patent for the land, and convey to him. *Murphy* paid the purchaſe money and fees, and gave *De Byerly* a bottle of wine, for his ſervice. When *Murphy* returned home, he told *Farneſly*, that the land had been granted to another, from whom he was obliged to purchaſe, and therefore he could not pay him. It was the cuſtom of the proprietaries, in giving titles in the manor of *Pittsburgh*, to prefer ſettlers to any other; and they have even refuſed to grant deeds to ſome, for land or lots, which others had improved; reſerving them for the improvers, when they ſhould apply. If *Farneſly* had not ſold, he would, from the uſual indulgence of the proprietaries, have got a patent for this land, in preference to any other; and as *Murphy* had bought from him, he would have had the ſame preference. Land, ſuch as this, and near it, has been ſold for 10*l.* per acre.

Brackenridge and *Young*, for the defendant, faintly controverted the fraud, and inſiſted, that the plaintiff could not recover by *aſſumſit* for money had and receiv-
5 *Burr.* 2592. ed, on ſuch a caſe as this; and for this cited *Nightingale v. Deviſme.*

Roſs and *Woods*, for the plaintiff, read and relied on
2 *Burr.* 1012. what is ſaid by *Lord Mansfield* in *Moſes* and *M'Farlane*,
Cowp. 290. and in *Hawkes v. Saunders.*

PRESIDENT. There are three queſtions.—1. Has the plaintiff any juſt demand, againſt the defendant?

2. Has he brought it forward in a proper ſhape?

1792.

3. And, if he has, how much ought he to recover?

1. The merits are clear for the plaintiff. He ſold only his claim and poſſeſſion, not the title; this the defendant undertook to procure himſelf from the proprietary. The defendant got from the plaintiff all that was promiſed him; all that he then expected; all for which he was to pay to the plaintiff 42*l.* and this he ought to have paid.

2. The objection to the form of the action is better founded, and ſtrong. But courts have been daily enlarging the liberality of this action, and leaning more againſt nonſuiting a plaintiff, with juſtice on his ſide. The caſes neareſt the preſent, in which this form of action has been held to lie; are *Clarke v. Shee*, for notes, and *Longchamps v. Denny*, for a maſquerade ticket. And if you preſume, that the defendant has ſold the land, and received the worth of it, your preſumption will be ſomething like that in the caſe of the maſquerade ticket. There is another preſumption, which may be made, to ſupport this action, from the defendant's having received the profits of the plaintiff's poſſeſſion and improvement. The beſt form of action ſurely has not been choſen; but the objection is unreaſonably extended, in ſaying, that the money muſt not only have been received by the defendant, but paid by the plaintiff. It is clearly enough if the defendant have received money from the plaintiff's property, or for the plaintiff's uſe, from any body. The objection is not excluſively directed to us, by a motion for a nonſuit; but to you alſo on a general verdict. We ſhall not direct a nonſuit.

2 *Burr.* 1007. 2 *Burr.* 1243. *Doug.* 626—651 *H. Bla.* 641. *Comp.* 289—91. *Comp.* 197, *Loff.* 756. *Doug.* 132.

2 *Burr.* 1005 *Comp.* 284—4.

See Porter v. Bretzon, poſt.

3. As to the quantity of damages. Some caſes, where there is a juſt or reaſonable cauſe for retaining the money, till there has been a legal inveſtigation, might juſtify a jury in refuſing even intereſt to a plaintiff. In ſome caſes damages ought to be meaſured by the loſs of the plaintiff; in ſome, perhaps, by the gain of the defendant, proceeding from the unjuſt detention. And in ſome caſes, it is proper to give exemplary damages. Indeed theſe remarks which would have applied to a ſpecial *aſſumſit*, are leſs proper in the preſent form of action, which goes only for the money ſuppoſed to have been actually received. But this caſe is highly fraudulent.

2 *Burr.* 1005 —1012.

1792. The jury returned with a verdict for the plaintiff for 159*l.* 12*s.* $9\frac{1}{4}$*d.* damages.

NOTE.—This verdict was the firſt within my notice, where the jury went any conſiderable length, to puniſh fraud, by penal damages. The example deſerves imitation, and if it were generally followed, little or leſs inconvenience would flow from the want of power to decree a ſpecific performance. The verdict appeared (from a paper which the jury handed to the prothonotary) to have been made up thus :—

	l.	*s.*	*d.*
Debt,	42	0	0
Intereſt,	17	12	$9\frac{1}{4}$
Damages,	100	0	0
	159	12	$9\frac{1}{4}$

A motion for a new trial was talked of, on the ground, that *indebitatus aſſumſit* being of the nature of an action of debt, the jury could give no more damages than the intereſt. But the parties accommodated the matter; the defendant paid, I believe, 112*l.* and we heard no more of it.

ROBERT M'KEE *v.* GEORGE THOMPSON.

THE declaration ſtated, that the defendant's father was indebted to the plaintiff 17*l.* 7*s.* 3*d.* that the defendant, *his executor*, referred the claim to arbitrators, who made an award in favour of the plaintiff; and that the defendant *as executor as aforeſaid* promiſed to pay. The pleas were *non aſſumſit* and payment, and *non aſſumſit infra ſex annos.*

It appearing on the evidence, as ſtated in the declaration, that the debt was not the debt of the defendant, but of his father, whoſe executor he was; that the reference was entered into by the defendant *as executor*; and that the award was againſt him *as executor*;

Woods, for the defendant, moved for a nonſuit.

Young, for the plaintiff. The defendant might have demurred, but having pleaded to iſſue, muſt now move in arreſt of judgment.

PRESIDENT. For a variance between the count and the evidence, the court may direct a nonſuit. But for

1792.

a variance between the count and the writ, the defendant muſt demur, plead in abatement, or move in arreſt of judgment. This is a variance between the count and the writ; the writ charging the defendant perſonally, and the count charging him as executor. The defendant has neither pleaded in abatement, nor demurred; but pleaded to iſſue. This iſſue muſt be tried. The evidence ſupports the allegations in the declaration. The jury may find a verdict againſt the defendant as executor; and the defendant may move in arreſt of judgment.

The jury found a verdict againſt the defendant *as executor* for 17*l.* 7*s.* 3*d.*

A motion in arreſt of judgment was made; and a rule to ſhew cauſe was entered. It was not argued till *December* term, 1793.

Young, for the plaintiff, ſhewed cauſe againſt the motion.

An executor is bound by a promiſe to pay, though he has no aſſets. *Swinb.* 395. *Bane's caſe*, 9 *Co.* 93.

The addition of *executor* will be rejected as ſurpluſage. *Brown v. Dunnery*—*Wallis v. Lewis.* *Wheeler v. Collier*, *Cro. El.* 456. *Hob.* 218. 2 *Ld. Ray* 1215.

The reference was as executor; ſo is the declaration. It is according to the truth of the caſe.—*King v. Thom.* 2 *Eſp.* 23.

If an executor refer a diſpute to an arbitration, he is bound by the award; and cannot afterwards plead *plene administravit.*—*Barry v. Ruſh.* And the verdict being againſt the defendant *as executor*, cannot alter the legal effect of the award on the ſubmiſſion. 1 *Ventr.* 119. 1 *T. Rep.* 487. 1 *T. Rep.* 692.

Woods, for the rule. The caſes only ſay, that, where there is a promiſe, the executor ſhall not ſay, there are no aſſets. The caſe of *Barry v. Ruſh* does not ſay, that a judgment can be given, though the writ be againſt a defendant perſonally, and the declaration againſt him as executor. No caſe ſays ſo: and there is a material difference between an action againſt a defendant perſonally, and againſt him as executor.

PRESIDENT. Juſtice *Buller* determines the caſe of *Barry v. Ruſh* on this point, that it was an action on a bond, by which the defendant bound *himſelf*, his *heirs*, *executors*, &c. to pay; an expreſs, ſolemn, and perſonal promiſe. I think this the true ground of the deciſion. But if the doctrine laid down by Juſtice *Aſhurſt* can be extended generally to all caſes, and if our opinion ſhould

1792. be againſt the plaintiff in this motion; we may, on his motion (on the ground, that the ſubmiſſion and award amounts to an admiſſion of aſſets, or a promiſe, on conſideration, to pay) ſet aſide the verdict, as contrary to the legal effect of thoſe facts. For, (on this ground) the declaration would, in effect, ſtate a perſonal promiſe, and would not vary from the writ. Juſtice, as well as true intereſt, ſeems to ſuggeſt, that the defendant ought to ſettle this matter out of doors, without more delay.

NOTE.—The caſe of *Pearſon v. Henry*, which denies, that a reference, by an executor or adminiſtrator, to an arbitration, is, of itſelf, an admiſſion of aſſets, was not known here, when the preceding caſe was argued. However, no deciſion was called for; as the defendant gave judgment, with ſome delay of execution.

WASHINGTON COUNTY,

April Term, 1792.

THOMAS PHILIPS *v.* JOHN M'DONALD.

1 *St. L.* 193. AN action of debt for the penalty, on the act of aſſembly againſt uſury, had been brought before a juſtice of the peace. The juſtice having given judgment for the plaintiff, he appealed. It was agreed, by the counſel on both ſides, "that, if the opinion of the court were, that the juſtice had juriſdiction, the defendant ſhould plead to the merits; and that if the juſtice had not juriſdiction, the plaintiff ſhould be nonſuited."

Roſs for the defendant. The act againſt uſury, being a penal law, muſt be ſtrictly purſued. A juſtice of the peace is no court of record, but an exception out of the ordinary juriſdictions. The acts of aſſembly diſtinguiſh between courts of record, and juſtices of the peace. If a penalty be declared againſt a particular conduct, there muſt be a conviction by a jury, before the penalty can be recovered. The words, "eſſoign, protection,

1 *St. L.* 204, 227, 2 8, 23 248. 271, 273 389, 423, 46 2 *St L.* 4, 5, 12, 73, 184, &c. *old editions.*

1792.

wager of law," apply only to proceedings in courts of record. Only the four courts of *Weſtminſter* are courts of record, for ſuch a purpoſe as this. No ſuit for a penalty can be brought in *England*, in the Quarter Seſſions, or Staunary courts, or courts of Sewers, or courts of Conſcience, or courts Leet, though courts of Record *diverſo intuitu*.

2 *Hawk* 301, —2. 381, § 25, *c.* 5 § 33, *Doug.* 1, &c.

Brackenridge, for the plaintiff. The *Engliſh* law cited, applies only to criminal proſecutions. The ſtatute of uſury is to be conſidered with thoſe giving the juſtices juriſdiction of 40*s*. 5*l*. 10*l*. "*All debts*" includes this; for it is not among the excepted caſes, "*Rent*," &c.—The defendant may appeal, and have a jury trial. The law intends a benefit; and it ought to be given in the eaſieſt manner poſſible. Uſury is a political evil, a foreſtalling of money, and oppreſſive to people in diſtreſs.

Roſs, in reply. Juſtices have juriſdiction only in contracts expreſs or implied; never in torts. There is no appeal under 40*s*.. Wherever juriſdiction over penalties is given to juſtices, it is given in expreſs words.

Cur. adv. vult.

NOTE.—This caſe was never mentioned again. I believe the plaintiff gave it up. See *Gregory v. Blaſkford*, *Barnabee v. Goodale*, *Curlewes v. Dudley*, *Farren v. Williams*, *White v. Boot*, *Leigh v. Kent*. But the act of 19 of *April*, 1794, *c*. 234, §. 10, has ſettled this queſtion, on this point, for the future, and given juſtices juriſdiction in caſes of penalties for uſury.

6 *Co*. 19, *Cro*. *El*. 737. 2 *Ld*. *Ray*, 872. 1 *Bac Abr*. 40 2 *T*. *Rep*. 274. 3 *T*. *Rep*. 362. 3 *St*. *L*. 536.

JAMES HINDMAN *v.* JAMES LOGAN.

PROCEEDINGS to recover a demand, before a juſtice of the peace, who had given judgment for the plaintiff before him, were removed by *certiorari* into the court of *Common Pleas* of *Waſhington* county.

Roſs, for the plaintiff in error, filed ſeven exceptions to the record ſent up.

1. It does not ſtate the ground of the demand, ſo as to be a bar to another ſuit for the ſame cauſe.

2. If there was any cauſe of action, it was for rent; and the title of land muſt have come in queſtion.

1792. 3. No ſummons, appearance, or confeſſion of the defendant is ſtated.

4. The plaintiff exhibited no account, nor ſued out a ſummons, nor directed the juſtice to iſſue a ſummons; the ſummons was iſſued by the juſtice without any authority from him.

5. The juſtice was intereſted, and the money was claimed by him; and the name of the plaintiff uſed without his conſent or knowledge.

6. The judgment was entered wrongfully and without evidence.

7. The record is not ſo full and entire, as it remains before the juſtice. There is no ſummons. It is informal, &c.

To eſtabliſh ſome of the exceptions, the depoſition of the plaintiff in error was offered.

Young, for the defendant in error, objected that the witneſs was intereſted.

Dall. 268, 405. *Roſs*, cited *Guthrie v. White*, and *Pinchin v. Fry*;—and diſtinguiſhed between evidence to a court, and evidence to a jury.

The court held the firſt exception ſufficient to reverſe the proceedings; and ordered the money to be reſtored with coſts.

ALLEGHENY COUNTY.

June Term, 1792.

Pennsylvania *v.* Robert M'Birnie.

ROBERT M'BIRNIE was indicted, together with another man, at a court of Oyer and Terminer for that he "intending to maim *Adam Cotter*, of malice aforethought, and by lying in wait, unlawfully and feloniouſly did make an aſſault on the ſaid *A. Cotter*, and him did beat, wound, and ill treat, and of malice aforethought, and by lying in wait, did gouge and bruiſe his right eye,

and bite off his nose, with intent to disfigure him, against the statute, &c." 1792.

Galbraith, for the state, read the act of assembly of 31st *May*, 1718, making the offence stated in this indictment a felony of death. 1 *St. L.* 136. 1 *Hawk. c.* 44.

The case was as follows. *M'Birnie*, with the other person indicted, coming out of *Pittsburgh* drunk, overtook *Cotter* on the road. They were strangers to him. *M'Birnie* insulted *Cotter*, knocked him down; *gouged* his eye, and bit a piece out of one of his nostrils, at the point of his nose. At the time of the trial, the eye had become quite sound, and the nose was healed up so as not to appear greatly disfigured.

Brackenridge, for the prisoner. Your verdict must determine whether for the offence stated to you, this man shall suffer death. This is a most aggravated assault and battery, and I know no punishment short of death too great for it. But the offence proved is not that laid in the indictment. The intention of the makers of the statute is to be regarded; and that is to be collected from the occasion of making it. The *Coventry act* (as it is called in *England*) from which this part of our act is taken, was made on occasion of a gross outrage perpetrated on Sir *John Coventry*, in revenge of some words spoken by him in the *House* of *Commons*. That transaction, and *Cook's* case on the *Coventry act*, is a good description of the offence pointed out by our act. Malice aforethought is to be collected from the circumstances, deliberate violence, a weapon likely to kill or maim, &c. In the case in *England*, there was a deliberate compassing, and lying in wait, and the nose was slit with a weapon, which shewed design. *Cotter's* eye is not "*put out*," nor his nose "*cut off*," or "*slit*;" there is only a small piece bit off, which will happen in any scuffle, without a previous purpose. Though the offence be odious, the statute is highly penal.

4 *Bac. abr.* 647—9. *Hume's Eng.* c 65. 4 *Comm.* 7. 6 *St. Tr.* 212. 3 *Bac. abr.* 665 666. 2 *Ld. Ray*, 1488.

Galbraith, for the state, contended that there was malice aforethought, and that it may, on many occasions, be difficult to prove express malice.

PRESIDENT. In murder, malice is presumed from the circumstances, and the defendant must shew the want of it. If *M'Birnie*, therefore, instead of maiming, had killed *Cotter*, it would have been murder, or a kill-

1792. ing, *with malice aforethought.* But the act of assembly, which makes this maiming a felony of death seems to take much pains to render a previous purpose an essential ingredient in the crime. The words *of purpose, with malice aforethought, by lying in wait, and with intent to disfigure,* seem to imply something more, than the malice presumed in murder, and to require express proof of the intent to disfigure previously conceived, and insidiously carried into effect. This case is evidently a hasty quarrel, a violent outrage, by a wild young ruffian, frantic with liquor; and I think there are not circumstances sufficiently strong, to make it felony.

4 *Comm.* 207. 2 *Hawk.* 176. No case on the *English* statute has been cited, nor has any occurred to me, but that of *Cook* and *Woodburn,* for slitting the nose of Mr. *Crispie,* whose face was terribly hacked with a hedge bill. And, from the device of the court to get over the impudent defence of *Cook,* that he did it, with intent not to disfigure, but to kill, we may gather how strongly all the circumstances of this crime must be ascertained.

The jury found him guilty of the trespass in assaulting and beating *Adam Cotter,* except as to the contriving and intending to maim and disfigure him of purpose and of malice aforethought, and by lying in wait, and of that not guilty. Sentence imprisonment.

The other defendant was afterwards tried and acquitted generally.

NOTE.—It would seem that few, if any, other indictments on this act, have existed in this state. For the late *William Bradford,* Esq. (who from his situation as attorney general, had good opportunity of knowing) while a judge of the Supreme Court, in a memorial written at the request of the governor, and presented to him 3d *December,* 1792, and afterwards published under the title of "An Enquiry how far the punishment of death is necessary in *Pennsylvania,*" mentions, that "this act has remained a dead letter in *Pennsylvania.* No person has been prosecuted under it."

Enquiry, &c. *p.* 33.

3 *St. L.* 599. The act of 22d April, 1794, has changed the punishment of this offence into confinement at hard labour, and a fine, three fourths of which goes to the party grieved.

Leach's Crown Law, 55, 59, 192, 394. I find there have been many prosecutions on the *Coventry act* in *England.* See *William Lee's* case, *Barney Carrol's*

case, *Tickner's* case, and *Mill's* case. In *Tickner's* case, Justice *Gould* told the jury, that it was not necessary, that either the malice aforethought, or the lying in wait, should be expressly proved to be on purpose to maim and disfigure. In *Mill's* case, *C. Baron Eyre*, said, a person who intends to do this mischief, and, by *deliberately watching an opportunity*, carries that intention into execution, may be said to *lie in wait on purpose*. A particular concealment or lurking place is not necessary; if, having formed an intention to maim, he comes unawares behind, and takes a convenient opportunity of deliberately doing the injury, it is a *lying in wait*, though he takes no particular length of time, nor appears to use any extraordinary degree of preparation to perpetrate the mischief. 1792.

JOHN M'KEE *v.* Executors of ELEAZER MYERS.

THIS was an action of *assumsit* founded on an order in the words following:—"*March* 21st, 1788—Sir, I make bold to trouble you to let *John M'Kee* have to the amount of one hundred pounds in certificates on my account, if he stands in need of it, and this shall be your receipt from your friend, *Eleazer Mires*.—To Col. *John Irwin*." *E. Myers* died. *John Irwin*, to whom the order is directed, is one of the executors and, having since refused to satisfy the order, this action was brought.

Proof having been made, that *Myers* had desired one *Robert M'Kee* to write an order to this effect, and sign his name to it; *Woods*, for the plaintiff, was proceeding to read the order; when *Brackenridge*, for the defendant, objected to its being read, unless *Robert M'Kee* who wrote it, were called, to prove that he wrote it, agreeably to the directions of *Myers*, and signed *Myers'* name to it, by his authority; and that the order now produced was the order written at the time the witness spoke of, and that the name of *Myers* was in *Robert M'Kee's* hand writing, and by the authority of *Myers*. *Robert M'Kee*, being uninterested, and the best witness, must be here. Mr. *Brackenridge* strongly hinted, that

1792. it was a forgery, and that *Robert M'Kee* would not dare to ſwear to it.*

Woods, for the plaintiff. There is no ſubſcribing witneſs; and proof of hand writing is enough.

PRESIDENT. This is not the caſe of a note or order ſubſcribed by the maker or drawer: in that caſe, if there be no ſubſcribing witneſs, proof of hand writing is ſufficient. Here the perſon who wrote the note, and ſubſcribed the name, is unintereſted, is the beſt witneſs, and ought to be here. However, as the objection might have been unexpected, appeared new, and might have been ſuppoſed to deſerve leſs weight, than has been given to it; it would be beſt to withdraw a juror by conſent.

This was done: and this caſe was tried again, at *December* term, 1792; when *Robert M'Kee* attended, and proved this order to have been written and ſigned by him, at the requeſt of *Myers*, and exactly as he dictated. It was alſo proved, that *John Irwin* was, at that time, in Philadelphia, and had in his hands certificates the property of *Myers*; which *John M'Kee* wanted to pay for land warrants. But before *John M'Kee* arrived at *Philadelphia* with the order, *John Irwin* had left the city; and the order was never preſented, till in the ſpring of the year 1790, after the death of *Myers*. The plaintiff alſo proved the payment of 14*l.* to one *Murphy*, in 1787 or 1788, on account of *Myers*, which, it was now aſſerted, on the part of the plaintiff, was the conſideration for this order or part of it. But the defendants proved, that in the fall of the year 1789, *J. M'Kee* and *E. Myers* ſettled all their accounts, when there was a balance found due to *Myers*, for which *M'Kee* gave his note, with a receipt in full for all debts, dues, and demands; which was produced, dated 16th *November*, 1789. Between *March* 1788, and the ſpring of 1790, *J. M'Kee* had often applied to *J. Irwin*, to do buſineſs for him, in the land office, and had often complained of diſappointment in certificates—once wrote him a letter, and ſent him certificates to do his buſineſs; but never mentioned this order, till the ſpring of 1790, after the death of *Myers*.

* *Robert M'Kee* was, in fact, then indicted for forgery. —See next caſe.

PRESIDENT. This order appears to be but an *authority* to receive the certificates, and this, not being exercised in the life time of *Myers*, expired by his death, which transferred to his executors all his property in the certificates. As to the 14*l.* paid to *Murphy*, it was included in the settlement of accounts, and released by the receipt of 16th *November*, 1789. Therefore no interest remains in *M'Kee*, from the order, and there ought to be a verdict for the defendant. 1792.

The plaintiff then suffered a nonsuit.

WESTMORELAND COUNTY.

June Term, 1792.

PENNSYLVANIA *v.* ROBERT M'KEE.

ROBERT M'KEE being sued by *David Semple*, before a justice of the peace, for a balance of about thirty shillings, set up a defence, that the debt was contingent, and that the contingency had not happened — The justice gave judgment against him, and *Semple* dying, *M'Kee* went to the justice and produced a receipt in full, which he said was given him by *Semple*, and had been discovered by him since the judgment. The receipt had been originally given by *Semple* for a debt paid to him as administrator of *Samuel Miller*. But there was now an interlineation, in different ink, and smaller letters, immediately above the name of *David Semple*, as follows, "and one pound ten shillings in full of my demand against *Robert M'Kee*." The original receipt and the interlineation were in the hand writing of *M'Kee*; but it was the interlineation only that was charged as a forgery.

There were three counts in the indictment. All stated the particular circumstances. The first was on the act of assembly; the 2d was at common law, for forging

1792. this receipt; and the 3d was at common law, for uttering this receipt knowing it to be forged. The ſubſcribing witneſs proved, that the interlineation was not in the receipt, when it was ſigned; and it was alſo proved, that the receipt being detained as ſuſpicious, by the juſtice to whom it was offered as evidence of payment, *M'Kee* had paid the balance to the adminiſtrators of *Semple*.

Brackenridge, *Roſs*, and *Young*, for the defendant.—The *Britiſh* ſtatutes againſt forgery extend not here. It *Woods Inſt.* 4. 8. is not forgery at common law, for it is not a deed, nor 1 *St. L.* 5. is it forgery by our act of aſſembly. It is no falſe compoſition, but a real receipt. Compariſon of hands is no evidence in criminal caſes, and the proof here is only by 4 *Comm.* 358. compariſon of hands. *Sidney's* caſe.

The caſe of the *King v. Ward*, was out of the common way, a ſevere proceeding on the interpoſition of the houſe of lords, to avenge one of their own body; and 2 *Ld. Ray.* 1461. the doctrine there laid down changes the whole law on the ſubject, and is not ſupported by any authority.

2 *Ld. Ray.* 1461. 2 *Bac. abr.* 569. 1 *St. L.* 5. *Galbraith* and *Nagle* contended, that it was a forgery at common law, and on our act of aſſembly, citing the *King v. Ward*—and other authorities.

PRESIDENT. Though the firſt count purſues not the 1 *St. L.* 5, 64. words of the act of aſſembly, yet if it ſtate facts, which, in legal conſtruction, amount to counterfeiting the hand and ſeal of another; why ſhould it not be a good indictment on the act of aſſembly? Such facts are here ſtated. 2 *Hawk.* 354. This however may be queſtionable.

But there is no doubt, that the ſecond count at common law fully comprehends this caſe; and that the forgery of *any writing*, which may be prejudicial to another, 2 *Ld. Ray*, 1461. is forgery at common law. The caſe of the *King v. Ward* is well founded, both on authority and principle; and we rely on it, as concluſive in the preſent caſe.—The third count is alſo at common law, for uttering this receipt, knowing it to be forged, and is good, if the facts are proved.

As to the evidence; where the matter is *doubtful*, it is a good rule, to incline to acquittal. But preſumptive evidence, however decried or dangerous, is often deciſive, and as convincing to the mind, as the moſt poſitive teſtimony. It is the language of facts. And, to reject

1792.

ity would, in cases of private villainy, such as this indictment states, hold out a general charter of pardon. Comparison of hands, or proof by witnesses acquainted with the hand writing, is proper proof to be left to a jury, especially where, as in the present case, the writing is found in the possession of the party. Whether the presumption arising from such proof will outweigh the common presumption of innocence, and produce conviction, may depend on the concurrent circumstances, and their impression on the minds of the jury.

4 *Comm.* 353. *Gilb. L. of Evid.* 53. 2 *Hawk.* 607. *Ld. Ray.* 40. 2 *Bac. Abr.* 313. 1 *Burr.* 644.

We think the proof strong against the defendant, and sufficient, if you believe it, to justify you in convicting him of forging this receipt, and uttering it, knowing it to be forged.

Verdict not guilty, on the 1st count; and guilty, on the 2d and 3d counts.

At *December* term, 1792, a motion in arrest of judgment was argued, on the following grounds, by the defendant's counsel.

The jury having acquitted *Robert M'Kee*, on the first count, we have only to examine whether any judgment can be given on the second or the third. The third count will require little attention. The bill was found, at *March* sessions, 1792, and tried at *June* sessions, on the 14th of *June*, 1792, and the third count lays the publication on the 27th *June*, 1792, which is about two weeks after the trial, and three months after the finding of the indictment. The offence laid in the third count being thus impossible, it remains only to consider, whether judgment can be given on the second count.

2 *Hawk.* 325, 326.

The second count charges *Robert M'Kee*, "that he, on 19 *November* 1790, having in his possession a certain receipt in writing, signed by one *David Semple* (lately deceased) which receipt was in the words, letters, figures, and cyphers, following, that is to say, *Received* 19 *November* 1790, *the sum of* 4*l.* 10*s. in part of a debt due to the estate of Captain Samuel Miller, deceased, for a mill-saw—David Semple*, he, the said *Robert M'Kee*, afterwards, that is to say, on the said 19th day of *November*, in the year of our *Lord* 1790, with force and arms, at the township aforesaid, in the county aforesaid, the said receipt falsely did alter, and cause to be altered, by falsely

1792. forging and adding the cyphers, words, and letters, *and one pound ten ſhillings in full of my demand againſt Robert M'Kee*, with intention to defraud the foreſaid *David Semple* (deceaſed) of the ſum of *one pound ten ſhillings* againſt the peace, &c."

We think judgment cannot be given on this count.

Rex v. Tucker, 1 *Ld. Ray*, 1. 1. The indictment muſt ſtate an offence, with ſufficient certainty, without any explanatory matter *dehors* the record, and ſo, as, if proved, no preſumption of innocence can remain. Now this count ſtates not, in what part of the receipt the inſerted words were inſerted, but only that the words were inſerted on the ſame paper. They might have been below the name of *David Semple*, and ſo it would not have been his receipt, and he could not have been defrauded. So alſo it might have been on the back of the paper.

2. This count ſtates not what *the words and cyphers inſerted* were; and the court is not now to know, in what manner they were proved; but to judge only from the record, and it aſcertains not what words were added.

As the court will make no intendment to criminate the defendant, nor aid the indictment, by the evidence, we move, that the judgment be arreſted. And we would ſuggeſt, that there was at the trial ground to believe, and we can now prove, that the ſum expreſſed in the receipt was really paid; that, at any rate, the offence is trivial, and the defendant has been ſufficiently puniſhed, by the anxiety, expence, and trouble, which he has undergone.

This caſe was mentioned again, and the opinion of the court given, at *June* term, 1793.

PRESIDENT. As the moſt natural preſumption to be drawn from the face of this indictment is, that the words conſtituting the forgery were added after the name of *David Semple*; and, if this were the caſe, the fraud, if any, would have been ſo palpable, that no man could be deceived by it; the judgment muſt be arreſted, on the ſecond count.

It clearly muſt be arreſted on the third count, the time laid in the indictment being contradictory to the caption and the trial.

FAYETTE COUNTY.

June Term, 1792.

JOHN PORTER v. BASIL BROWN.

1792.

IN *aſſumſit*, there were three counts. The two firſt were on a ſpecial undertaking to pay *Porter* 33*l.* 9*s.* with intereſt from 15th *November*, 1787, due by one *Campbell*, by bond dated 27th *March*, 1788. The conſideration of this promiſe was the ſale of a houſe by *Campbell* to *Brown*, on which *Porter* had a mortgage for the ſum demanded. The third count was for money had and received. The bond produced had no date, but it had been paſted to the mortgage, which was dated 27th *March*, 1788, and recited a bond of the ſame date, and for the ſame ſum.

It was proved, that, about a month after the date of the mortgage, *Brown* ſent a meſſage to *Porter*, that *Campbell* had left this country, that he had purchaſed *Campbell's* houſe mortgaged to *Porter*, and, by contract, was to pay the debt due to *Porter*; that he would come to *Porter*, but was afraid of the ſmallpox; but if *Porter* would come to him, he would give his own bond for the money, and ſecurity if required; and that all that he wanted was a little time to make the payment. This meſſage was delivered to *Porter*, who ſaid he was ſatisfied. *Porter* did not record his mortgage.

Roſs for the defendant. The plaintiff cannot recover on the firſt or ſecond count, as the declaration ſtates a bond dated 27th *November*, 1788, and the bond ſhewn has no date. And if he undertake to recite a deed, he muſt do it exactly; or if he ſtate a ſpecial agreement, he muſt prove it as laid. He cannot recover on the third count, for he has proved no money received by the defendant for his uſe.

Woods for the plaintiff. The bond is but matter of inducement; not the gift of the action. It has been paſted to a mortgage, which recites it as of even date,

1792. and is dated 27th *March* 1788. On the third count the plaintiff will recover; for the houſe being then bound to the amount of the mortgage, it will be preſumed, that, when *Brown* bought the houſe, he gave the price, and got back ſo much from *Campbell* as would pay the plaintiff. In the caſe of *Farneſly v. Murphy*, in the court of Common Pleas of *Allegheny* county, a caſe reſembling the preſent, the plantiff recovered by the direction of the court, on the authority of decided caſes.

March Term 1792, *Ante.* *p.* 22.

PRESIDENT. Where the plaintiff's proceedings have carried any appearance of hardſhip on the defendant, as in penal actions; or where the pleadings have been unneceſſarily extended by him; he has been held to very ſtrict rules; and opportunities have been eagerly ſeized, to nonſuit him. He has been treated with much greater indulgence, when the plain rules of juſtice have required, that he ſhould recover.

Alcorn verſus Weſtbroke, 1 *Wils*, 115. *Payne v. Bacombe*, *Doug.* 628.

The declaration is of a debt due on a bond, dated 27th *March*, 1788. The bond produced is without date. The declaration ſtates a promiſe to pay a debt due on a bond. The evidence is of a debt due on a mortgage. It might be ſaid, that the date of a bond is immaterial, and the bond itſelf but matter of inducement. And as the ground of the action is not the bond of *Campbell*, but the promiſe of *Brown*, it may be queſtioned, whether the variance be material, and whether there ought not to be a recovery on the firſt or ſecond count. We ſhould be unwilling to nonſuit a plantiff on a mere formal exception: and, in this caſe, we conceive ourſelves not to be under this neceſſity, becauſe, in our opinion, he ought to recover on the third count. We rely on the authorities, on which the deciſion in the caſe of *Farnesly v. Murphy* was founded, and on all the circumſtances of this caſe. The conſideration was valuable and full.—*Porter's* conduct was fair and indulgent; and his claim juſt. Relying on the promiſe of *Brown*, he did not record his mortgage, and ſo loſt his lien on the houſe, which remained unincumbered in the hands of *Brown*. The two firſt counts for the ſame ſum gave *Brown* notice of the nature of the demand, and prepared him to anſwer it. In ſuch a caſe, every preſumption poſſible of methods in which the defendant, by receiving the houſe, might have received money for the uſe of the plaintiff,

Perry v. Nicholſon, 1 *Bur.* 278.

ought to be made: and there ſhould be a verdict for 33*l.* 9*d.* with intereſt from 15th *March*, 1787. 1792.

The jury found a verdict for 42*l.* 12*s.* 4*d.*

NOTE.—The following caſes were not known here, when *Porter v. Brown* was tried. *Iſrael v. Douglaſs*, in C. B. Eaſter Term, 1789.—The firſt count was for money had and received. The defendant was indebted to *D.* 64*l.* 9*s.* who was indebted to the plantiff 40*l.* *D.* applied to the plantiff to lend him a further ſum. The plantiff refuſed without ſecurity. *D.* gave him an order on the defendant for the ſum due to him. The plaintiff ſent this order to the defendant, who agreed to pay the plantiff the ſum really due to *D.* and thereupon *D.* received 70*l.* from the plantiff. Lord *Loughborough*, Chief Juſtice, *Gould* and *Heath*, Juſtices, thought this ſufficient to ſupport the count for money had and received. *Wilſon*, Juſtice, thought not, unleſs it had been ſhewn, that money had been received by the defendant for the uſe of *D.* *H. Bla.* 249.

Leery v. Goodſon, B. R. Eaſter Term, 1792. The plaintiff having diſtrained pictures of *P.* his tenant, the defendant agreed, if the plaintiff would deliver the pictures to him, that he would pay the rent. The court held, that this would not ſupport a count for money had and received; and that a ſale of the pictures by the defendant could not be preſumed here, as in the caſe of the maſquerade ticket; for a contrary preſumption riſes, from his receiving the pictures, to avoid their being ſold. 4 *T. Rep* 687. *Doug.* 132.

WASHINGTON COUNTY.

June Term, 1792.

GEORGE HENRY, ſurviving obligee of ABRAHAM USHER, *v.* WILLIAM DONNAGHY and JOHN MORRISON, Executors of JOHN DONNAGHY.

THIS was an action of debt on a bond dated 17th *July*, 1776, for the payment of 50*l.* 3*s.* 8*d.* on the 1ſt *Auguſt* enſuing the date, with intereſt from the date.

1792. On 17th *July*, 1776, *John Donnaghy* gave to the plaintiff an order drawn by *Edward Hand* on *James Milligan*, merchant in *Philadelphia*, dated 13th *July*, 1776, for 71*l.* payable to *John Donnaghy* or bearer, at forty days ſight. And the plaintiff gave *Donnaghy* a receipt for the order, purporting that credit was to be given on the bond for it, when paid. In 1786, *Donnaghy* ſent by a friend, the reſidue of the debt and intereſt to the plaintiff, who then refuſed to give credit for the order, and offered to return it. This was rejected, and the reſidue of the money was not paid becauſe credit would not be allowed for the order. In 1788 this ſuit was brought. It did not appear that there had been any demand on *Milligan*, or any notice to *Donnaghy* that the order remained in the plaintiff's hand till in 1786, nor was it ever offered to *Donnaghy*, nor to his executors till after this ſuit was brought.

Chamberlayne v. Delaree, 2 *Wils.* 353. *Reſs*, for the defendant. The order, being retained ſo long, amounts to a payment of ſo much. *Donnaghy* could not, at this diſtance of time recover from *Hand* the drawer.

Woods, for the plaintiff. *Uſher* and company could not ſue on this order in their own names. The receipt ſhews, that no credit was to be given till the order was paid. In 1786, in 1788, and now, *Hand* and *Milligan* are both in undoubted circumſtances, and there is no inſtance when the not returning of a bill has been held a payment, unleſs there has been an inſolvency of the drawee.

PRESIDENT. This difficulty is not likely to occur often, where the drawee is in good circumſtances and has not refuſed payment; for then there is no inducement to apply to any other. But, ſince giving an order is held to be a giving credit to the drawee, and therefore a payment, I ſee no reaſon why it ſhould not be, ſo in all caſes; ſo that ſuch holder ſhould never be allowed to have recourſe to the drawer, who had effects in the hands of the drawee. The holder, who gives credit, takes all riſk of recovering from the drawee; for the drawer undertakes that the drawee will accept and pay at the time; but if the holder gives further time, he makes a new contract, and diſcharges the drawer. The holder undertakes to demand; and, be-

1 *T. Rep.* 1-5

fore he can recover from the drawer, or any indorſer, (for every indorſer is as a drawer) he muſt ſhew a demand on the drawee, and a refuſal. The circumſtances of the drawer and drawee ought to make no alteration. If they be good, ſo much the better for the holder, the plaintiff, unleſs he has precluded himſelf, by his own negligence. If they are otherwiſe, the defendants ought not now to run the riſk. I lay no ſtreſs on the want of an indorſement. The receipt and the delivery of the order ſhew the meaning of the parties. *John Donnaghy* undertook to lend his name to *Abraham Uſher* and company, for the recovery of this money from *Milligan*; and *Abraham Uſher* and company, undertook to demand this money. This demand has never been made. There ought to be credit given on the bond for 27*l.* as paid forty days after ſight, allowing a reaſonable time for that. 1792.

The jury found a verdict accordingly.

NOTE.—See the caſe of *Stedman v. Gooch.*—*Eſpinaſſe's* Reports of Caſes at Niſi Prius, 3.

WESTMORELAND COUNTY.

September Term, 1792.

PENNSYLVANIA *v.* SAMUEL WADDLE.

WADDLE was indicted for a forcible entry and detainer, on 2d *June*, 1790, of a meſſuage, &c. in *Derry* townſhip, in poſſeſſion of *Andrew Johnſon*.

Roſs, for the proſecutor, called a witneſs, to prove that the defendant was within the lines of the proſecutor's claim.

Woods and *Young*, for the defendant, objected to this teſtimony, till proof ſhould be made, that the proſecutor had been in actual poſſeſſion of the premiſes.

1792. PRESIDENT. It is ſaid, that if a man be in poſſeſſion ever ſo long by virtue of a defeaſible title, and continue, after a claim by him, who has the right of entry, it is a new entry; and if, after that, he hold by force, it is a forcible detainer. I ſhould be diſpoſed to conſtrue a defeaſible title to mean a tenancy at will, or ſuch, as, by the mere entry of the owner, may be defeated. It is alſo ſaid, that the three years poſſeſſion muſt be of a lawful eſtate; yet I doubt whether an entry or claim of one, not having the right of entry, would defeat the protection of three years peaceable poſſeſſion. And it may be ſaid, that, if a forcible detainer be an offence, even after a peaceable entry, it matters not, whether, at the time of the entry, there was an adverſe poſſeſſion, or not. But it is expreſſly ſtated, that it is only an *actual* poſſeſſion, and not a *legal* poſſeſſion, in the proſecutor, that will warrant reſtitution to him. On the whole, we think it ſafeſt to ſay, that actual poſſeſſion ought to be proved in the proſecutor.

1 *Hawk* 280 § 23, 290. § 53.

1 *Hawk.* 290, §. 54.

1 *Hawk.* 288, §. 46.

There was then evidence and argument on both ſides.

PRESIDENT. There are two points to be eſtabliſhed, to found a conviction.

1. Poſſeſſion of the proſecutor; and

2. Force by the defendant.

1. As to poſſeſſion: it does not appear, that *Johnſon* had poſſeſſion till after *Waddle* was in poſſeſſion, and after the force alledged. If he had no poſſeſſion before the force alledged, the defendant cannot be guilty.

2 *Burns* 179. 2 *Bac. abr.* 558.

2. If there was no force, he cannot be guilty. Words are the ſlighteſt ſymptoms of force. If you think it was the meaning and tendency of the words, to impreſs on *Johnſon* a terror of perſonal harm, if he ſhould proceed to take poſſeſſion; this is force. If you think their meaning was only to ſignify that *Waddle* would not give up his claim, which he thought a juſt one, till by a legal trial, it was declared unjuſt; this is not force: and whatever might be the poſſeſſion, the defendant muſt be acquitted. One of the witneſſes underſtood it in this ſenſe.

The jury found the defendant guilty: ſtating that they found force in the detainer only, not in the entry; and that they conſidered *Johnſon* in poſſeſſion from the commencement of his title, which was a ſale by the commiſſioners.

A new trial was moved for, and granted, on the ground, that there was not evidence of poſſeſſion previous to the ſuppoſed force. 1792.

At the ſecond trial, at *December* Seſſions, 1792, the caſe appeared as before. It was ſtated to the jury, that there was no proof of poſſeſſion, and, therefore, that the defendant ought to be acquitted.

The defendant was acquitted.

FAYETTE COUNTY,

September Term, 1792.

Richard Waller *v.* Jonathan Hill.

THIS was an action of covenant. *Waller* had ſold to *Hill* 600 acres of land in *Waſhington* county, to be paid for in whiſky; and for the failure of payment, this action was brought. *Waller* had bought this land from one *Hawkins*; but had no title to more than 100 or 200 acres; the title to all the lands round it being in other perſons, and among others, in *James Stephenſon*, to whom, by a conveyance duly recorded, the ſame *Hawkins* ſold. *Waller's* conveyance from *Hawkins* was not recorded.

Woods, for the defendant. *Waller's* conveyance from *Hawkins*, not being recorded, is void as againſt *Stephenſon's* conveyance from *Hawkins*.

Bradford, for the plaintiff. The act of aſſembly, for recording deeds, extends only to legal titles. The title of *Hawkins* was only equitable, an improvement claim.

President. As improvement claims paſs from one to another, for valuable conſiderations, the ſame inconvenience, and danger from frauds, would ariſe, from keeping ſuch conveyances concealed, as from concealing conveyances from ſtrict titles.

If the land ſold by *Waller* to *Hill*, was the ſame ſold

1792. by *Hawkins* to *Stephenſon*, and *Stephenſon* had not notice of the previous ſale to *Waller*; *Stephenſon's* title was good, at the time of the ſale to *Hill*; and, for ſo much, there was no conſideration. But if not, and if *Hill* has got the land, or might have got it; he muſt pay for it, or for ſo much as he has got, or might have got.

There was a verdict for the defendant. The plaintiff had formerly recovered part of the price.

ALLEGHENY COUNTY.

December Term, 1792.

Pennsylvania *v.* Henry Misner.

Misner was indicted—1. For forging an aſſignment to *William Irwin*, of a bill given by *Miſner* himſelf and *James Read*, to *Eneas Randall*.

2. For uttering this aſſignment, knowing it to be forged.

The evidence was that *Miſner* having in his poſſeſſion a ſingle bill on himſelf and *Read*, aſſigned it, in *Randall's* name, for goods, to *Irwin*, who knew neither of them, and ſuppoſed him to be *Randall*. *Irwin* ſued *Read* before a juſtice, and recovered, on this bill. It was alſo proved, that an order drawn by *James Read*, in favour of *Henry Miſner*, for nearly the ſame ſum, on *James O'Hara*, had been preſented and paid.

Brackenridge, for the defendant, contended that there was no forgery, for the following reaſons.

1. The name of the payee, in the body of the bill, is *Enos Randole*, and the name ſubſcribed to the aſſignment is *Enos Randell*.

2. There being no ſeal to the aſſignment, no property in the bill is aſſigned, and no perſon could be injured.

3. *Miſner* is a co-obligor in the bill, and only a ſurety. He paid it; and had a right to aſſign it, ſo as to recover

from *Read*, the real debtor: assigning a note on himself is equivalent to giving a new note, which he might do. 1792.

4. *Misner* being in possession of the note, he must be supposed to have authority to dispose of it.

PRESIDENT. 1. There is no evidence in what manner the person named *Enos Randole* in the body of the bill, who is the payee, really writes his name, for there is no evidence, that the bill was written by him. But if there were, the variance is so inconsiderable, that if the defendant were to escape under it, any man might accomplish all the dangerous effects of forgery, without risking the punishment. The variance makes not another name, but the same, for all purposes of deception. 2 *Salk.* 660. *Comp.* 220.

2. It is equally criminal to forge a name, as to forge a seal, if there be an intention and possibility to defraud. The name, without a seal, gives authority to demand, sue for, and receive, the money; and, therefore, gives a full possibility of defrauding.

3. *James Read* is also obligor, liable to pay the whole money, and, in fact, has been compelled to pay it, by a competent authority. *Misner's* being an obligor gave him no right to use the name of *Randall* and make a note on him.

4. The defendant's having the bill in his possession is presumption of authority over it, and (if no obligation to pay remained on him, but did on *Read*) may reduce the transaction to an act of indiscretion, of a dangerous kind indeed to indulge, but not punishable as a forgery. The case then is brought to this point:—Did the defendant assign this bill, with intent to defraud? That depends on this; had *Read* paid it before? Of this there is presumption, arising from the payment by *O'Hara*, on *Read's* order, of nearly the same to *Misner*. You must determine the fact from the circumstances.

The jury acquitted him.

DAVID FRANKS *v.* MICHAEL STIVERS.

1792. THIS was an action of Trover for three barrels of ſpirits, and one of ſherry wine. The caſe was thus. Stivers, a waggoner, undertook, at *Philadelphia*, to carry theſe and other goods from *Philadelphia* to the mouth of *Buffaloe*, on the *Ohio*, at a certain place; received part of the money at *Philadelphia*, and was to receive the reſt on the delivery of the goods to *N. M'Farlane*, at the mouth of *Buffaloe*.

Before *Stivers* arrived at *Pittſburgh*, on his way to *Buffaloe*, *M'Farlane* died; and *L. Brinſon*, an agent of *Franks*, in room of *M'Farlane*, agreed to take the goods at *Pittsburgh*, and ſend them to *Buffaloe* by water, deducting a certain part of the agreed price of carriage. The goods were accordingly delivered at *Pittsburgh*, except the goods in queſtion, which were detained for the carriage, and ſtored up ſixteen weeks; after which on reaſonable advertiſement, they were ſold by *Stivers*, at public ſale. Taking all things into view, there then remained a balance in *Stiver's* hands of 5*l.* 6*s.* 2*d.* The goods were all bought by the agent of *Franks*, for his uſe, ſo that he ſuffered no damage, but from not having the overplus of 5*l.* 6*s.* 2*d.*

2 *Ld. Ray*, 752. 2 *Eſp.* 345.

Brackenridge, for the defendant. *Stivers*, a common carrier, had a right to retain till the carriage was paid. The inconvenience would be intolerable, if an obſtinate owner might let the goods lie as long as he pleaſes.—The carrier, at a diſtance from home, having no place to keep the goods, might be obliged to pay ſtorage, till, perhaps, the whole value of the goods be conſumed, and no value remain, to ſatisfy the carriage. The carrier, truſting to the price of his carriage, has, perhaps, nothing elſe, to ſupport himſelf and team, on his way home again. Therefore, having performed his ſervice, by carrying the goods to the place agreed on, he has not only a lien on the whole goods, but, on refuſal of payment, an abſolute property in ſo much of them, as will pay the carriage. This is not like the caſe of a pledge, where the parties have no veſting of the property in view, and where the owner may have his goods, on payment of the money, and the lender, having no ſpecial

time of payment, has no view to any inconvenience, that may happen. This is a new caſe: for, in former caſes, the retaining of the goods has been a ſufficient compulſion to pay the carriage. And, in this caſe, the ſale of the goods has operated merely in the ſame manner, as a compulſion on the owners, to come forward, take their goods, and pay the carriage: for the owner has bought all, and got the goods, and ſo has received no damage except from the non-payment of the balance remaining in the defendant's hand. For this, a complete tender not having been made, there muſt be a verdict. 1792.

Woods, for the plaintiff. The inconvenience would be greater, if a carrier could immediately ſell the goods, than if he muſt wait for his price, till the owner come and claim them. For, generally, the owner is under ſufficient inducement from the value of the goods, to pay their carriage, and take them away. The power claimed for carriers, and exerciſed by the defendant, is againſt all law. And the court ought to declare ſo.

PRESIDENT. As it is admitted, that there ought to be a verdict againſt the defendant for the ſurplus; as the want of this is the only real damage, which the plaintiff has ſuffered; and as the ſale was occaſioned by his own groſs delinquency; this does not ſeem to be a caſe proper for damages beyond mere compenſation; and it is therefore uneceſſary for us, to ſay any thing as to the right of carriers, in ſuch caſes; and perhaps, it will conduce moſt to juſtice, if they and owners, have a reſpect for the rights of each other.

Verdict for plaintiff accordingly.

WASHINGTON COUNTY,

December Term, 1792.

Leſſee of ROB. HAMILTON *v.* VAN SWEARINGEN.

1792. THE plaintiff's title was founded on a location in name of *Michael Marſhall*, and a ſurvey made on it for *Michael Marſhall*, by the deputy ſurveyor.

Brackenridge and *M'Keehan*, for the plaintiff, offered to prove, that a conveyance of this land from *Marſhall* to the leſſor of the plaintiff, made previous to the demiſe in the ejectment, had been loſt; and therefore contended, that parole proof of its contents ſhould be admitted.

Roſs, for the defendant. Such teſtimony is dangerous, and introductory of fraud. The plaintiff might have got a deed of confirmation, reciting the firſt deed, and referring back to it; or he might have proceeded under the act of aſſembly, empowering the Supreme Court to ſupply defects in the titles to lands, occaſioned by the loſs of deeds.

2 *St. L.* 444.
3 *St. L.* 294.

PRESIDENT. The general rule is, that the beſt teſtimony in the power of the party muſt be produced. In ſome caſes ſuch teſtimony as is offered muſt be admitted from neceſſity. But it is of ſo dangerous a nature, and may be ſo adapted to the purpoſes of fraud, that neceſſity alone can juſtify its admiſſion, and where ſafer teſtimony can be had recourſe to, it ought to be conſtantly rejected.

In this caſe, *Robert Hamilton* might have proceeded in two ways, either of which would have been more ſafe, ſolemn, and certain; than this now propoſed.

1. He might have applied to *Marſhall* for a deed of confirmation. This would have been the ſafeſt and the beſt.

2. Or if *Marſhall* refuſed, or could not be found, he might have applied, under the act of aſſembly, to the Supreme Court, where there would have been a kind of adverſe proceeding, and, with notice and leiſure to examine the circumſtances, proper precautions could have been taken againſt fraud.

With theſe methods in the power of the plaintiff, we cannot ſay that the teſtimony offered is the beſt; and we therefore reject it. 1792.

The plaintiff ſuffered a nonſuit.

ALLEGHENY COUNTY,

March Term, 1793.

HUGH HENRY BRACKENRIDGE, *v.* ANDREW M^c FARLANE.

THE defendant appealed from the judgment of a juſtice of the peace againſt him for 10*l.* 1793.

The plaintiff declared here in *aſſumſit* for his ſervices, as attorney and counſel, in conducting a certain ſuit in *Weſtmoreland* county court.

Woods, for the defendant. There being a table of fees, fixing an attorney's fee, in any cauſe at four dollars, no action can be ſupported for any higher ſum. And no action lies for counſel fees.

PRESIDENT. Attornies in this ſtate, act in two capacities, as attornies, and as counſel. The plaintiff in any ſuit can recover from the defendant, no more than four dollars as his attorney's fee. But this does not limit attornies or counſel here, in their demands againſt their clients, for their ſervices and management, as agents or counſel; and a jury may give, over this ſum, a juſt compenſation for ſuch ſervice and management.

The jury found a verdict for 10*l.* and judgment was given on it.

WESTMORELAND COUNTY.

March Term, 1793.

ARTHUR ST. CLAIR *v.* THOMAS GALBRAITH'S Adminiſtrators.

1793. SEVERAL actions of debt on bonds, which had been given in payment of lands ſold, having been referred to auditors, and report made; the defendant's counſel moved to ſet this report aſide; becauſe the ſums became due in the time of paper currency, and the auditors had not reduced them by the ſcale; but found the ſums mentioned in the bonds.

Brackenridge, for the defendants. The authority given by the law to the auditors, to determine by equity, to what caſes the ſcale applies not, ought to be liberally conſtrued, but not ſo extended, as to deſtroy the law. I know, but two caſes, to which the ſcale applies not.

1. Where the ground of action is evidence of a contract before the period of depreciation, though itſelf within it; as a bond given after, on a contract before the depreciation.

See Wharton v. Morris. Dall. 125. 2. Where it is the meaning of the parties, that the ſum expreſſed ſhall not be paid in a depreciated currency. But to extend this exception, as the auditors have done here, and not to apply the ſcale, becauſe the depreciation was not known here, when it took place in *Philadelphia*, will defeat the law, as much as if there never had been a ſcale. Inſtead of one fixed ſcale for the whole ſtate, it will vary in infinite degrees, in every part of the ſtate, and occaſion all the inconveniences, which the law intended to prevent.

Lee v. Riddle Dall. 175. *Roſs* and *Woods*, for the plaintiff. It was the intention of the law, to give to auditors a different authority from that of courts and juries; and conſtitute them chancellors with full authority to examine the juſtice of the caſe, and decide according to all its circumſtances: the ſuppoſed value of the money, at the place of the contract, the value of the property ſold in the eſtimation of the

parties contracting, and the partial payments in depreci- 1793.
ated currency, though not reducible, are all taken into conſideration, to enable the auditors to aſcertain what ſum would really correſpond to the intention of the parties expreſſed in the contract. This has been the uniform practice of courts and auditors. In the caſe of *Lee v. Biddis*, in the Supreme court, on a bond given on a previous contract made within the period of depreciation, the auditors did not confine themſelves to the value of the money even at the time of the contract, but gave hard money. Exceptions were filed and argued, as here; but the court confirmed the report.* In the preſent caſe, the land ſold was worth 2000*l.* hard money, and was ſold for 2000*l.* when depreciation was unknown here. Of that ſum, 1400*l.* was paid, when the money was at 20 for 1. And, when the whole ſum in this report ſhall be paid, not more than half of the price in the view of both parties, at the time of the contract, will be paid. Courts have always rejected nice ſubtleties, to attain ſubſtantial juſtice. They have permitted a *feme coverte* to be ſued as *ſole*. When a verdict againſt law, but founded in juſtice, as a verdict againſt the plea of the ſtatute of limitations, has been obtained, they have refuſed to ſet it aſide. When one has been convicted on an indictment, he has been forced under the influence of the ſentence to be paſſed, to do juſtice to the party injured. If you ſeek equity, you muſt firſt do equity. Reports of auditors or arbitrators, judges choſen by the parties, are peculiarly favoured. The court will not take from us the advantage we have got, by this report, when taking this would deprive us of juſtice.

PRESIDENT. The caſe in the Supreme court is deciſive of this. There muſt be judgment on the report.

* This caſe was a manuſcript ſtatement certified by Mr. *Burd*, prothonotary of the Supreme court. There was alſo a letter from Mr. *Lewis*, one of the counſel, ſtating it.

Leſſee of FREDERICK MERCHANT & PETER BRIGHT
v. JACOB MILLIRON's Executors.

1793. THIS was an ejectment for 250 acres of land.

The plaintiff's title was a warrant to *Merchant* and *Bright*, for 250 acres of land on the waters of *Big Sawickly*, adjoining land of *Jacob Milliron*, &c. dated 10th *February*, 1786; a ſurvey of 268 acres and 155 perches, and allowance, made 12th *April*, 1786; and a patent 27th *October*, 1787.

The defendant alſo ſhewed a warrant in name of *Jacob Milliron*, in truſt for the heirs of his father, dated 23d *Auguſt*, 1786, for 200 acres; a ſurvey on 12th *September*, 1786, of 220¾ acres; and a patent 12th *October*, 1786.

It appeared in evidence, that, upwards of twenty years ago, *Jacob Milliron* bought from *William Thomſon* his claim to a certain tract of land. *Thomſon*, who was ſurveyor of the diſtrict, ſurveyed it. And there was no other claim to it; nor was there any diſpute with any of the neighbours about the boundaries. In *March*, 1780, *Milliron* had a houſe, a barn, and ſixty acres of land cleared on it. On 4th *December*, 1784, *Milliron*, who had ſeveral ſons, got two warrants (one in the name of one of his ſons) of 300 acres each, charging intereſt from *March*, 1780. On theſe he had his whole claim ſurveyed on 26th *April*, 1785. This ſurvey was found to contain 900 acres. The ſurveyor told the *Millirons*, that he could not return ſo much on their two warrants, and they muſt get another for the reſidue. He returned more than 300 acres on each, and run a line, by their directions, dividing the returned land from that not returned. This line was within 50, or 60 perches of *Milliron's* houſe, and cut off a ſmall part of his meadow, and a piece of good bottom land, ſuch as would be choſen as part of the place. *Merchant* and *Bright* never had any claim to any part of *Milliron's* claim, till they took out their warrant. And the ſurveyor never went on the land after the date of their warrant, but returned their ſurvey, from the plat he had made for the *Millirons*. The plaintiff's warrant,

and *Milliron's* warrant of 23d *Auguſt*, 1786, were both for the land in *Milliron's* claim not returned on the two firſt warrants; and this was the land in diſpute. 1793.

Brackenridge and *Galbraith*, were for the plaintiff.—*Roſs* and *Young*, for the defendant.

Brackenridge objected to the reading of *Milliron's* two firſt warrants, becauſe it had been proved, that they were laid on other ground; and to any evidence of his improvements, unleſs they were within the diſputed ground.

PRESIDENT. The defendants may controvert the proof of the warrants being laid on other ground, we cannot prevent their attempting it, the jury will judge. Let teſtimony alſo be admitted to ſhew where the improvements named in the warrant are, whether within or without the diſputed lines, and how near them; that from their proximity or diſtance, with reſpect to the diſputed lines, the intention of the *Millirons* expreſſed in the warrants, may be known, as to what ground is included in the warrants, whether the diſputed land or not.

Roſs. The land-office will receive returns of ſurvey to the extent of 400 acres and allowance, and even upwards, though the warrants call but for 100 acres: and the claimant will obtain a patent for the whole. But if leſs has been returned, and a ſpeculator ſteps in, and takes the ſurplus of a fair claim, he has committed a fault, and will you not lay hold of the ſlighteſt circumſtance, to defeat him. The 9th ſection of the act of 8th *April*, 1785, makes void every ſurvey made before the warrant comes into the hands of the deputy ſurveyor, or without going on the ground. The plaintiff's ſurvey is therefore void, as the ſurveyor never was on the land, after the date of the warrant. Of courſe the patent is void. 2 *St. L.* 316.

Brackenridge. The original ideas in this country, ſupported by the habits of thinking Eaſt of the mountains, and the opinions of courts and juries here, made it long be conſidered as the law of the land, that an actual ſettlement gave a title. But when the judges of the Supreme court came here, this doctrine was overſet; and the law is now ſettled otherwiſe. Until thoſe deciſions of the judges of the Supreme court, our legiſ-

1793. lators never thought of any precaution, to protect ſettlements againſt titles; becauſe they thought it as impoſſible, that they could be hurt, as that the winds could ſweep away the mountains. In the end of the year 1786, I brought forward the law, which has ever ſince been continued in force, to protect ſettlements. I conſulted the judges, to know whether they would permit evidence of improvement againſt title. They ſaid no: our ſyſtem is otherwiſe. The earlieſt title muſt hold. But this is not a caſe of ſettlement. It is not a claim of 300 acres, but of 900, three times a reaſonable claim.

PRESIDENT. The full extent of the claim of old *Milliron*, an early ſettler in this country, is but a reaſonable proviſion for himſelf and his family of ſons; and ought to be protected if poſſible. The diſputed land is contiguous to the houſe, and ſuch as would naturally be choſen as part of the place. If the plaintiff's ſurvey had been regular, we ſhould have thought ourſelves bound by former deciſions, to ſay, that the title is in the plaintiff. But, as the ſurvey is void, you may perhaps conſider yourſelves as ſtanding in the ſituation of the board of property; and give ſuch deciſion by your verdict, as the board would have given, if the caſe had come before them.

The jury found a verdict for the defendant.

NOTE.—I have ſince underſtood, that it has been decided, by the judges of the Supreme court, that the act of 8th *April*, 1785, extends only to the *new purchaſe*, the land propoſed by that law to be ſold. If ſo, the point, on which this caſe was put to the jury, was wrong. But it has ſince been determined by judges of the Supreme court, that, under the act of 26th *March*, 1785, and other acts giving ſanction to improvements or ſettlements, evidence of improvements or ſettlements, without office titles, might be given. And in the caſe of *Wells v. Wright*, in *Waſhington* county, at a court of Niſi Prius in *May*, 1793, it was held, that a warrant taken out by one man, for the actual ſettlement of another, before the law of *December*, 1786, was void.

William Graham *v.* William Goudy.

1793.

THIS was an action of *indebitatus aſſumſit*, for money laid out and expended, for money had and received, and for money due on an *inſimul computaſſent*.

Goudy, *for value received*, had, before it was due, which was in *May*, 1795, aſſigned to *Graham* a bond, on one *Neily* and one *Emerſon*, who, in *March*, 1795, went down the river. *Neily* never returned publicly. In *July*, 1795, there was judgment againſt *Emerſon*, on this bond, a writ of enquiry, and final judgment for 21*l*. *Emerſon* knew, that *Neily* had directed one *Smith*, to pay the bond aſſigned to *Graham*; and underſtood from *Graham*, that he had given up the bond to *Smith*, on whom *Emerſon* had a bond; and ſaw *Smith* have the bond. In conſequence of this, *Emerſon*, who was only a ſurety, had given up to *Neily* property, which he had got from him to diſcharge the bond. There was ſome proof, that, when this bond was aſſigned, *Graham* had his choice of other bonds, and preferred this. And, in converſation, *Goudy* told *Graham*, to take care, as that bond was now gone from him. *Emerſon* being inſolvent, the preſent action was brought by the aſſignee againſt the aſſignor of this bond.

Brackenridge and *Young*, for the defendant. This is not a negotiable paper, the indorſement of which renders the indorſor liable to the indorſee, on failure of the drawee. If it were, not uſing due diligence, or giving credit is equal to a payment, and diſcharges the indorſor. The failure of payment, in this caſe, aroſe from the conduct of *Graham*, who deceived *Emerſon*, by giving the note to *Smith*, a debtor of his. *Graham* has alſo delayed a long time. There is no evidence of what the conſideration was, whether 21*l*. or only 5*s*. and ſo there is no certain meaſure of damages. And there is evidence, that *Graham* was to run the riſk.

Roſs and *Woods*, for the plaintiff. This action lies for money paid by miſtake, or for a conſideration which happens to fail; for money got through impoſition, expreſs or implied; or where undue advantage is taken of the plaintiff's ſituation; it lies in all caſes where the defendant has money, which, in equity and good con-

1793. science, he ought not to retain. This is not a negotiable paper; nor is this action brought as if it were.

PRESIDENT. The recovery is put on two grounds:—

1. Impoſition or fraud;

2. The conſideration happening to fail.

1. Fraud is not to be preſumed, and has not been proved. If the circumſtances were equally in the knowledge of both, and the aſſignee took the riſk, he muſt bear the loſs.

2. If the tranſaction was fair, and if the conſideration failed through the negligence of *Graham*, he muſt bear the loſs. It does not appear, that the conſideration, for which value was given, was an undertaking that the bond ſhould be paid, but an aſſigning of the bond. If there had been an undertaking by the aſſignor, and reaſonable diligence by the aſſignee, the aſſignor would have been liable.

The jury gave a verdict for 20*l.* But, on motion, this verdict was ſet aſide, becauſe there was no proof of fraud, or expreſs promiſe to be anſwerable for the payment of the money; and becauſe *Graham's* negligence and trafficking with *Smith*, after the bond was due, and want of notice or demand on *Goudy*, is ſufficient to counterbalance any preſumption that can ariſe out of the caſe, in favour of *Graham*.

It was never tried again.

GARRET CAVODE and NATHAN WILLIAMS *v.* WILLIAM M'KELVEY.

THIS was an action of *indebitatus aſſumſit*, for money had and received.

One *Sterret* purchaſed, for 29*s.* 6*d.* at commiſſioners' ſale, the claim of one *George Knox* to a tract of land in *Weſtmoreland* county, and ſold it, for 50*l.* to *M'Kelvey*; who ſold it to *Cavode* and *Williams*, for 120*l.* of which 50*l.* was paid to *Sterret*, and 70*l.* to *M'Kelvey*; and they bound themſelves to warrant and defend, according to the ſums reſpectively received.

1793.

Knox's claim was on a location of 25th *July*, 1769, on which no ſurvey had been made, till after *Cavode* and *Williams* had purchaſed from *Sterret* and *M'Kelvey*. Before that time, the land, for which *Knox* had applied, (except 129 acres worth 5*s*. per acre, which, after their purchaſe, *Cavode* and *Williams* ſurveyed on *Knox's* location) had been all ſurveyed on two warrants to one *Fechter*, and one *Hammel*, from whom *Cavode* and *Williams* purchaſed. *Sterret*, after his purchaſe from the commiſſioners, having entered a caveat againſt the ſurveys of *Fechter* and *Hammel*, on the ground, that *Knox's* location was an elder title, *Cavode* and *Williams*, alarmed at this, to ſecure themſelves, purchaſed *Knox's* claim from *Sterret* and *M'Kelvey*. But afterwards, conceiving *Knox's* claim bad, as againſt *Fechter's* and *Hammel's*, they brought this action to recover back all the money paid to *M'Kelvey* (the remaining 129 acres, at 5*s*. per acre, amounting only to 32*l*. 5*s*. and ſo not to 50*l*. paid to *Sterret*).

Woods, for the defendant. Compromiſe of a doubtful title is a good conſideration. Money paid voluntarily, if it may be retained with a good conſcience, ſhall not be recoverd back, although the payment of it could not have been compelled by law. *Cann v. Cann cited* 1 *Atk* 10. 2 *Burr.* 1012. *Doll.* 148.

Brackenridge, for the plaintiff. The ſmall ſum of 29*s*. and 6*d*. paid for *Knox's* claim, at commiſſioners ſale, is ſo diſproportionate to 120*l*. paid by *Cavode* and *Williams*, that there is intrinſic inconſcionableneſs in the bargain, ſufficient to raiſe a preſumption of fraud. The plaintiffs muſt have been over-reached by the addreſs of *Sterret* and *M'Kelvey*. The land ſold by *Sterret* and *M'Kelvey* to the plaintiffs was, before that ſale, the property of the plaintiffs. *Knox's* title was void. And *Cavode* and *Williams* got nothing for the money they paid to *Sterret* and *M'Kelvey*. It was paid without conſideration, and muſt be recovered back.

PRESIDENT. In *aſſumſit* on a wager, "whether a decree in the court of Chancery would be reverſed, on appeal to the houſe of Lords," it was contended, that the event was not contingent, but certain; for the law is clear, evident, and certain. But it was held, that the conſideration was good, and the action lay. Settlement of a diſpute is part of the conſideration in this caſe, and *Cowp.* 37. *Loft* 383. 1 *T. Rep.* 60.

1793. seems to be the principal consideration in the view of the parties: that has not failed. There appears no fraud, nor concealment of circumstances, not equally in the knowledge of both parties.

There was a verdict for the defendant.

HIGH COURT

HIGH COURT OF ERRORS AND APPEALS,

At Philadelphia, July Term, 1793.

JAMES LACAZE, MICHAEL MALLET, and JOHN ROSS, plaintiffs in error, *v.* State of PENNSYLVANIA, for the uſe of LOUIS LANOIX.

AN information had been filed in the Supreme court of this ſtate, by the attorney general, in behalf of the Commonwealth, in debt, againſt *Lacaze*, *Mallet*, and *Roſs*, for the penalty of a ſtipulation entered into, by the plaintiffs in error, in the court of Admiralty of *Pennſylvania*. The Attorney General informed, that, on the 24th *October*, 1783, *Lacaze* and *Mallet* exhibited a bill to the judge of the court of Admiralty of *Pennſylvania*, ſetting forth, that five barrels of ſilver coin, amounting to 5285 *French* crowns, and 1580 dollars, ſaved from the wreck of a brigantine, and, on the ſuit of the maſter, taken by proceſs of that court, into the poſſeſſion of its marſhal, was the property of *Louis Lanoix* of *Bourdeaux*, that they were his agents, and that the coin ought to be delivered to them, to be tranſmitted to him; and that, upon this bill of *Lacaze* and *Mallet*, the judge of Admiralty decreed, that this coin, after deducting all coſts and charges, for ſaving it from the wreck, and proſecuting the ſeveral claims in that court, ſhould be delivered to them, on account of *Lanoix*, the right owner, that it might be remitted to *Lanoix*, agreeably to the tenor of their bill, they giving caution for the performance of the truſt repoſed in them agreeably to the practice and uſage of that court, and the laws of this Commonwealth; that, in conſideration thereof, *Lacaze*, *Mallet*, and *Roſs*, afterwards, on 4th *November*, 1783, appeared before the judge of the court of Admi- 1793.

1793. ralty, and ſtipulated and acknowledged themſelves to owe and be indebted to this Commonwealth, in the ſum of 4000*l.* ſterling, equal in value to 6666*l.* 13*s.* 8*d.** to be paid to the ſaid Commonwealth, in caſe *Lacaze* and *Mallet* did not well and faithfully perform the truſt repoſed in them reſpecting the ſaid coin, or ſhould fail to indemnify the ſaid judge, and the officers of the ſaid court, againſt all perſons lawfully claiming the ſame, and againſt the claim of *Lanoix*. The attorney general further informed, that the marſhal of the court of Admiralty, afterwards, on 6th *November*, 1783, by command of that court, after deducting all coſts and charges, delivered 1580 dollars, and 6330 crowns to *Lacaze* and *Mallet*, to be delivered forthwith to *Lanoix*. The attorney general further ſaid, that *Lacaze* and *Mallet* did not perform the truſt repoſed in them reſpecting this coin, and did not, nor did either of them, remit this coin to *Lanoix*, whereby action accrued to the Commonwealth, to demand and have, of *Lacaze*, *Mallet*, and *Roſs*, the ſum of 4000*l.* ſterling, equal in value to 6666*l.* 13*s.* 8*d.* which they, though required on 1ſt *July*, 1786, had not paid.

To this information the defendants in the Supreme court, pleaded payment; and, on trial, a verdict was found againſt them, that they did owe 3768*l.* 9*s.* 7*d.* and did not owe the reſidue 2898*l.* 4*s.* 1*d.* Judgement was given in the Supreme court, on this verdict; and the record being removed by writ of error, into the high court of Errors and Appeals, the general errors were aſſigned.

It was argued, at *July* term, 1792, by *Moylan*, *Miffflin*, *Ingerſoll*, and *Lewis*, for the plaintiffs in error; and by *De Ponceau*, *Coxe*, *Sergeant*, and *Rawle*, for the defendants in error. The arguments laſted three days; and a vaſt collection of authorities was ſtated. The judges took to this term, to conſider the caſe; and now, in delivering their opinions *ſeriatim*, went over the arguments and authorities on both ſides; and affirmed the judgment of the Supreme court.

CHEW, PRESIDENT. The counſel for the plaintiffs in error, in their arguments before us, have contended,

* It ſhould be 6666*l.* 13*s.* 4*d.*

that the judgment of the Supreme court is erroneous, and ought to be reverſed for various reaſons. 1793.

1. Becauſe, the Admiralty being a court of inferior juriſdiction, the declaration does not aver (as by the rules of law, they ſay, it was eſſentially neceſſary) that the ſubject matter, of which the court of Admiralty took cogniſance, was *infra juriſdictionem* of that court.

Much time was taken up, and many caſes cited on the queſtion whether the Admiralty is, or is not, a court of inferior juriſdiction; and, although I incline to think, on conſidering this point, that it is to be claſſed among the inferior courts, it appears to me, circumſtanced as this caſe is before us, to be totally immaterial for us to decide upon it, becauſe it appears, on the face of the record, that the Admiralty had paſſed ſentence, and that the ſecurity taken in that court, which is the ground of the preſent action, was for the performance and carrying into execution that ſentence; and I conceive, that, if the proceeding in the Admiralty was ever exceptionable, on account of the want of juriſdiction, the proper time to take advantage of it legally, was by application to the courts of Law for a prohibition to the court of Admiralty, while the cauſe was *there depending and before ſentence.* But, as ſentence in this caſe had paſſed in the Admiralty, we are, in my opinion, as a court of Law, precluded from calling in queſtion the juriſdiction of the Admiralty; but, on the contrary, muſt preſume, and take it for granted. It is now too late to examine into it. I ground my opinion on this point, on numerous adjudged caſes, ancient and modern, where motions have been made to the courts of *Weſtminſter* for prohibitions to the Admiralty and Spiritual courts, on ſuggeſtions of their not having juriſdiction; and, in all the caſes I have met with on the ſubject, the judges have univerſally held, that there is a great difference between an application made to them for a prohibition pending the ſuit and after ſentence. In the firſt caſe, pending the ſuit, the court will examine the whole caſe, and ſee the ground of the proceeding in the Admiralty or Spiritual court; but that the rule is quite the reverſe after ſentence is paſſed; in ſuch caſe they will not look out of the proceedings, for the party who applies for a prohibition muſt ſhew a nullity of juriſdiction clearly on the face of the proceed-

1 *Bunb* 17, 313. 1 *Str.* 187. *Comp.* 423. 4. 2 *T. Rep.* 472, 694 3 *T. Rep.* 5. 4 *Burr.* 2035.

1793. ings. I could cite a great number of cases to shew this to be a settled and established rule.

But even if it is admitted, that the declaration was defective, for not averring, that the cause was *infra jurisdictionem* of the Admiralty, it is clear to me, that the
1 *Wils.* 255. defect is cured by the verdict. The case of *Bull v. Steward* is in point. It was an action on the case against the defendant, bailiff of the Borough court of *Southwark*, for an escape of *Alice Rawlins*, on *mesne* process, and a verdict for the plaintiff. On motion in arrest of judgment, it was objected, that the declaration did not alledge in what manner *Alice Rawlins* was indebted to the plaintiff, but only, in general, that she was indebted. It might be on a judgment, or such a debt as that court had no jurisdiction of, nor does it appear, that the cause of action arose within their jurisdiction. To this it was answered, and *resolved by the court*, that this being *after* verdict we will suppose every thing proved at the trial, which was necessary to be proved, and that the cause of action arose within the jurisdiction, unless the contrary could be made appear on the face of the record. Judgment was given for the plaintiff.

Carth. 304. On error in the case of *Alston v. Buscough*, the case was thus. Debt was brought on the statute, 2 *Ed.* 6, of tythes, wherein the plaintiff demanded the treble value; and on *nil debet* pleaded, the plaintiff had a verdict. The error assigned was that the declaration was ill, in not alledging, that the defendant had carried away the corn without making an agreement for the tythes; for the statute gives the penalty only where the tythes are carried off without any agreement for so doing, therefore, if the defendant had agreed with the plaintiff for carrying off the corn without setting out the tythes, as it doth not appear but he might, then it had been no forfeiture. And the court was of that opinion, to wit, that the declaration was ill for the above reason, *if it had been upon a demurrer*; but this was helped by the verdict, for if there had been any agreement proved at the trial, the plaintiff could not have obtained a verdict.

Sr. T. Ray, 487. The case of *Hutchins v. Stevens*, was debt for rent against the lessee, brought by the grantee of the reversion. *Nil debet* was pleaded, and there was a verdict for the plaintiff. It was moved in arrest of judgment

that the plaintiff had not alledged in his declaration, that the defendant did ever attorn to the plaintiff's grant of the reverſion. Reſolved good enough after verdict. For it is apparent, if the plaintiff had not given the attornment in evidence, he muſt have been nonſuited; and whereſoever it may be preſumed, that any thing muſt of neceſſity be given in evidence, the want of mentioning it in the record will not vitiate it after a verdict. And ſo judgment was given for the plaintiff. 1793.

In the caſe of *St. John v. St. John*, the plaintiff brought debt for 40*l.* againſt the defendant, bailiff of *Stockbridge*, on the ſtat. 21 *Hen.* 6, for not returning him burgeſs of the ſaid town to the laſt parliament. The ſtatute directs that the ſheriff ſhall ſend his precept to the mayor, but, if there be no mayor, then to the bailiff. The plaintiff declared that the ſheriff had made his precept to the bailiff, without averring that there was no mayor. And, after verdict for the plaintiff, this was moved in arreſt of judgment. But the court was of opinion clearly, that it was good, for *we ſhall not intend, that there is a mayor*, unleſs it be ſhewed; *and, if there was one, it ſhould come properly on the other ſide.* *Hob.* 78.

Theſe caſes, but more pointedly the laſt, apply to another objection, which was, that the declaration does not aver, that *Lanoix* was the owner of the ſilver coin, and prove, that, if he was not, it ſhould have come properly from the other ſide.

2. The plaintiff's counſel object, that it appears on the face of the record, in this caſe, that the ſubject matter before the court of Admiralty was wreck. That wreck is of common law, and not of Admiralty juriſdiction. Conſequently, the whole proceedings of the Admiralty, in this caſe, were *coram non judice*, and, *ipſo facto* void.

Admit the fact to be as ſtated by the counſel for the plaintiffs in error, that it is apparent upon the record, that the ſubject before the court of Admiralty was wreck, in the legal and technical ſenſe of the term; and they are certainly right in their concluſion.

It may not be improper here to define the term wreck, and conſider in what reſpects it differs from flotſam, jetſam, and ligan.

Wreck, in its legal ſignification is confined to ſuch

1793. goods, as, after ſhipwreck at ſea, are, by the ſea caſt upon the land.

Flotſam is when a ſhip is ſunk or otherwiſe periſhes, and the goods float upon the ſea.

Jetſom is when a ſhip is in danger of being ſunk, and, to lighten the veſſel, the goods are caſt into the ſea.

Ligan is where the goods ſo caſt into the ſea are ſo heavy, that they ſink, and the mariners tie a buoy or ſomething to them, ſo that they may find them again.

No goods of the three laſt deſcriptions, that is flotſam, jetſam, and ligan, can be called or deemed wreck, ſo long, as they remain *on the ſea*; but if they are caſt on the land by the ſea, they *then*, and not till then, become wreck, and are undoubtedly ſubject to the juriſdiction of the common law courts only. But if they are taken up at ſea and brought on ſhore, I take it to be clear, that the court of Admiralty, and not the courts of Common Law, have the juriſdiction.

Molloy 241. *B.* 2, *c.* 5. 5 *Co.* 106-7. 2 *Inſt.* 167. 4 *Inſt.* 134-5. 3 *Comm.* 106.

To ſupport this objection then, it was incumbent on the plaintiff's counſel to ſhew clearly on the face of the record, that the ſubject matter in the court of Admiralty was goods caſt on the land by the ſea, and I confeſs, on the moſt attentive conſideration of the record, I can ſee nothing in it, to warrant the objection. The word wreck, it is true, is repeatedly to be found in it; but it is as often applied to the *ſhip only* out of which the ſilver coin therein mentioned was ſaved, never to the coin itſelf. But let the record ſpeak for itſelf. The petition of *Lacaze* and *Mallet* to the judge, ſets forth, that five barrels of ſilver coin, the property of *Lewis Lanoix*, merchant in *Bourdeaux*, for whom they ſay they were agents, had then lately been ſaved from the *wreck* of the *Brigantine*, *Count Durant*, whereof *Anthony Fourne* was maſter, and upon whoſe libel or ſuit, in the ſame court depending, the proceſs had iſſued, had been taken into cuſtody of the marſhall of the ſaid court; and the petition concludes with praying, that the ſaid *coin* ſhould be delivered to them, in order that the ſame might be remitted to the ſaid *Lanoix*, agreeably to the tenor of the petition, they giving caution for the performance of the truſt repoſed in them, agreeably to the practice and uſage of the ſaid court, and the laws of the Commonwealth. And caution having been afterwards given agreeably to

the decree, we find on the record, that the marſhall returns, that by virtue of the writ of the ſame court, commanding him, after deducting all coſts and charges for ſaving the ſaid ſilver coin from the wreck aforeſaid, &c. to pay over and deliver the ſame to *Lacaze* and *Mallet*, and that he did pay over and deliver the ſame accordingly. 1793.

This being a ſtate of the whole record before us, ſo far as reſpects the proceedings in the Admiralty, juſtifies the obſervation I before made, that the word "wreck," mentioned in the record, is applied to the brigantine *Count Durant*, and not to the ſilver coin ſaved out of her. All that can fairly be collected then from the record is, that the veſſel from which the ſilver was ſaved, had been *wrecked*, not that *the ſilver ſaved out of her*, which the court held plea of, was "*wreck*," in its technical meaning, that is, thrown by the ſea on the land. But *non conſtat*, by the record, where the brigantine was wrecked, that is, loſt or periſhed. A veſſel ſhip-wrecked at ſea, may, in common *parlance*, with ſtrict propriety be ſaid to be wrecked, and, for any thing that appears to us on the record to the contrary, that might have been the caſe here. The fact however is not aſcertained. To maintain the objection, the plaintiff's counſel ought to ſhew beyond a doubt, from the record, that the *coin* was *wreck of the ſea*. To infer it, becauſe the brigantine, out of which it was ſaved, is only ſtated generally to have been wrecked, is by no means ſufficient. This objection, therefore, is in my opinion unfounded.

3. It is objected, that, if the Admiralty had juriſdiction of the ſubject, and the caution or ſecurity there taken was right and proper, yet it belongs to that court *excluſively* to proceed upon it, and to enforce their own ſentence, conſequently no action can be ſuſtained, on the caution ſo taken, in a court of common law.

In ſupport of this objection, the plaintiff's counſel have cited and relied on ſeveral authorities, which I have looked into and conſidered, the principal of which I ſhall notice.

The caſe of *Smart v. Wolf*, was cited. But this was a caſe of prize, and I will obſerve once for all, that there can be no doubt, agreeably to the rule laid down in all 3 *T. Rep.* 336.

1793. our law books, but that the court of Admiralty, in all *prize cauſes* has the ſole and excluſive juriſdiction, and the Common Law courts cannot interfere, or give relief, or, in this particular caſe of prize, enforce the judgment of that court. In prize cauſes, and every incidental and conſequent proceeding therein, the Admiralty has ſole and excluſive juriſdiction.

Doug. 590. 4 *T. Rep.* 382. *Carth.* 476.

H. Bla. 164. As the caſe of *Brymer v. Atkins*, ſeemed to be an authority on which the plaintiff's counſel more particularly relied, I will give a ſhort ſtate of it. A veſſel and cargo had been condemned as prize, in the court of Admiralty at *Halifax*. An appeal was made from that ſentence to the lords commiſſioners of Appeals in *England* by the claimants, and ſecurity was taken in *Halifax* from the captors in the ſtrict form of a recogniſance, that if that ſentence was reverſed, the veſſel and cargo, or their value ſhould be reſtored to the appellants. The court of Appeals reverſed the ſentence of the court of Admiralty at *Halifax*, and were proceeding, on the ſecurity ſo taken, to enforce the performance of it. This caſe came before the judges of the Common Pleas, on a motion for a prohibition to the court of Appeals, and one of the principal grounds urged for the prohibition was, that the ſecurity was in the form of a recogniſance, which the Admiralty, not being a court of record, had no right to take. But the judges refuſed to grant a prohibition, and conſtrued the ſecurity, though irregularly taken in the form of a recogniſance, to be a ſtipulation and undertaking to reſtore the veſſel and cargo, if the court of Appeals reverſed the ſentence: and in the concluſion of their judgment on this point, they add, "The ſecurity, therefore, operating as a ſtipulation, *execution of it belongs to that court and that juriſdiction, to which the parties have agreed to ſubmit.*"

The obſervation I make on this caſe is, that it was a prize cauſe, in which the judges were ſolicited to prohibit the court of Appeals, a prize court, from enforcing the ſentence of the inferior prize court. The law being eſtabliſhed, as I have ſhewn, that, in all caſes of prize, the juriſdiction was ſolely and excluſively in the Admiralty, the judges were right, in determining, that the execution, in this caſe, belonged to the Admiralty or prize courts. The rule they lay down is not a general

one. It settles the point respecting prize causes, but goes no further. The judges apply the rule to that particular case only; no other was then in question before them. The case therefore fails in giving one satisfaction on this subject; and the question still remains, whether the courts of common law, in other cases, cannot hold plea of securities taken in a court of Admiralty. It is to be lamented, that no case decisive of this question is to be met with, and that we are left to gain what information we can from cases which seem to have some analogy to this. And I find a great variety, where such actions have been sustained on judgments and proceedings in inferior and other courts. 1793.

Robison's Entries, 183. 232. *Hansard*, 80.

Thus debt was brought in the court of King's Bench, on a judgment in the sheriff's court of the county of *York*; so on a judgment in the sheriff's court of the city of *London*. Debt lies on a statute staple; and on a recognizance in Chancery. Debt lies for an amercement or fine in a court Leet; and for a fine in admitting a tenant in the lord's manor court; and it lies on a judgment of nonsuit in an inferior court.

Vidian 123. *Cro El.* 356, 465, 544. *Hansard* 81. *Vidian* 127. *Co. Ent.* 118. *Cro. El* 628. *Lew. Ent.* 62. *Rastal* 254. *Vidian* 117, 119, 132. 3 *Lev.* 206. *Sir T. Ray.* 68. *Cro El.* 581. *Buller*, 167. *Esp.* 238.—*Clift's Ent.* 244. 1 *Wils* 316.

In most, if not all, of these cases, although the courts of *Westminster* could not take original cognizance, or hold plea, in the first instance, of the causes of action, which arose in the inferior courts, yet it is clear, that an action of debt may be brought there, to enforce and carry into execution their transactions; and, considering the Admiralty as an inferior court, I can see no reason, that carries *full* conviction to my mind, the case *of prizes* excepted, why the same might not be done as well on securities taken in the Admiralty court, as in the cases above referred to. But, supposing this on the whole to be a doubtful point, for my own part, I should not hold myself justifiable, in reversing the judgment of the court below, unless I could lay my hand on my heart, and say, I am fully satisfied, the court was wrong and mistook the law, which I cannot say with a good conscience upon the present question. It would not be sufficient to urge, that I have doubts upon it; I must be convinced, beyond all doubt, their judgment was erroneous, before I take upon me to pronounce it to be so.

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The cafe of *Morris v. Rees*, was cited by the plaintiff's counfel, in which it was adjudged, that a fuit by the affignee of a bail bond muft be brought in the fame court where the original action was laid.

3 *Wils.* 343.

2 *Bla. Rep.* 838.

In the fulleft report of this cafe, the reafon affigned by the judges is that the court where fuch action was brought is empowered to give general relief to the plaintiff and defendant in the original action, on equitable terms, which no court can properly do, but that in which the original action was brought. The reafon here given is peculiar to the fpecial cafe of a bail bond, and does not affect the cafe before us. And there is one cafe, and but one, that I have met with, where it was refolved, that a bail bond could be fued in another court. It is the cafe of *Chefterton v. Middlehurft*, where a bail bond given in the court Palatine of *Chefter*, was fued in the King's Bench. The defendant filed fpecial bail below, then moved to fet afide the proceedings.—The court held the bringing the action there to be unfair, unlefs there were fpecial circumftances to warrant it, as the defendants being out of the jurifdiction, which was not pretended to be the cafe; and the court refolved, that the plaintiff ought to have proceeded in the court below, and accordingly fet afide the proceedings in the King's Bench.

1 *Burr.* 642.

But it is faid, if this practice is admitted, it will make the lands of the fecurity liable to the payment of the money forfeited by the non-performance of the ftipulation; which would not be the cafe if the ftipulation was left to be enforced by the Admiralty, as that court could not legally touch the real eftate of the parties; that the ftipulation bound them perfonally, but a judgment in a court of common law would affect their lands.

It not having been proved, that the Admiralty, in the prefent cafe, had an exclufive jurifdiction, this objection can be confidered only as *argumentum ab inconvenienti*.

But the fame objection, if of weight, would lie in feveral cafes that have been mentioned in anfwer to it.—Thus on a judgment in a foreign country which does not bind land by their laws, debt, or *affumfit* will lie in *England*, where the judgment upon it is a lien on the defendant's real eftate. On a judgment in *England*, only the moiety of the lands can be extended on an *elegit*,

and retained by the plaintiff no longer than he is satisfied his debt and costs from the rents and profits; yet debt will lie in this state on a judgment in *England*, and the lands which the defendant holds here be taken in execution, and the fee simple sold by the sheriff under our laws. So on a judgment in one of the *American* states, *Virginia*, for instance, on a contract made there, where lands are by law not liable, and consequently were never in the idea of the parties as subject to be executed and sold to satisfy the debt, an action of debt will lie here, and the judgment thereon will be a lien on the land of the defendant. To an amercement or fine in a court Leet, it has been determined, that a distress is incident, which can be made on the goods, but not the lands of the person amerced. No other remedy can be pursued in a court Leet. Yet debt for the amercement will lie in *Westminster Hall*, and lands extended on the judgment. 1793.

1 *Roll. Ab.* 665. *Sir T. Ray.* 68. *Cro. El.* 581.

These cases are to me full answers to this objection. In all of them a species of property is subject to the second judgment, which was exempted in the first.

Another objection is, that Mr. *Ross* was only collateral security, for *Lacaze* and *Mallet*, to the Commonwealth, and, if responsible at all, in a common law court, no action of debt will lie against him, but the proper and legal remedy was an *indebitatus assumsit*, on the special agreement.

But how is it made out, that Mr. *Ross* was only collateral security for *Lacaze* and *Mallet* in this case? Take a summary view of the transaction. The court of Admiralty was in possession of a large sum of money, for which the judge was ultimately accountable to the right owner, whoever he might be, on his appearing and proving it to be his property. It was then his duty, as well as interest to take care that he did not part with it improperly. *Lacaze* and *Mallet* come into court as volunteers, and inform the judge that the money is the property of *Louis Lanoix*, a foreigner residing at *Bourdeaux*, for whom they say they were agents and transacted business, but from whom they do not pretend to have any power or authority to demand or receive this money, and pray the judge to put them in possession

1793. of it, in order that they might remit it to the ſaid *Lanoix*. The judge prudently and cautiouſly, I think, refuſes to deliver the money to *Lacaze* and *Mallet*, unleſs they will procure one or more perſons to undertake with them for the money's being remitted. Mr. *Roſs*, on this, ſteps forward, and becomes bound to the Commonwealth in the penalty of 4000*l.* ſterling, jointly with *Lacaze* and *Mallet*, that they ſhould remit the money, and, on the joint credit of them all, the money was afterwards delivered accordingly by the judge's order.—The caſe thus circumſtanced, there is no legal ground on which Mr. *Roſs* can be conſidered as collateral ſecurity in the engagement. It may with great propriety be ſaid, that, in the relation which ſubſiſts between Mr. *Roſs*, and *Lacaze* and *Mallet*, he was their ſecurity, but as between the Commonwealth and *Lacaze*, *Mallet*, and *Roſs*, they, from the nature and terms of the contract and undertaking, are all three clearly in my opinion principals, and, as ſuch, anſwerable to the Commonwealth for the non-performance of it; and, it being an expreſs contract, debt may be brought upon it agreeably to the ſettled rule of law, that an action of debt will lie, when the ſum or duty is certain and fixed.

My opinion is therefore that the judgment of the Supreme court be affirmed.

Biddle, J. Delivered his opinion, alſo at length, that the judgment of the Supreme court ought to be affirmed: becauſe the ſtipulation was to be then preſumed to have been taken judicially, in a ſubject within the juriſdiction of the court of Admiralty, and, as ſuch, a good ground of an action of debt at common law. The death of that worthy man, ſincerely regretted by all who knew him, has diſappointed my hope of being able to lay his argument before the reader.

Rush, J. On the trial of this cauſe below, there was no doubt upon the merits; and accordingly the jury found a verdict for *Lewis Lanoix*, the plaintiff, upon which there was judgment. The record being removed into this court by writ of error, a number of reaſons have been urged for reverſing the judgment.

If the ſtipulation be in every reſpect, and in every view of it, a void act, it will put an end to the controverſy. It is proper therefore to begin with this objection.

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The maxim, that conſent cannot give juriſdiction, ſeems to be a principle of univerſal juriſprudence; and muſt naturally take place in every country, where tribunals are inſtituted with a gradation of powers. If the parties of their own choice, could leave behind them inferior courts, and, by mutual agreement, reſort, in the firſt inſtance, to the higheſt tribunal, it would effectually confound the limits preſcribed to different juriſdictions, and fruſtrate the view of the legiſlator in drawing lines of diviſion among them. This idea ſhows the reaſon and the extent of the rule. It cannot therefore apply, where any inſtrument is acknowledged before a court or magiſtrate by the voluntary conſent of a *ſingle* perſon. For in *this* caſe the act of an *individual* has not the leaſt tendency to defeat that ſyſtem of ſubordination and diſtribution of authority among the various courts, on which the judiciary eſtabliſhment is founded.

Upon this principle it is, of a voluntary juriſdiction, by an individual, to uſe the expreſſion of chief juſtice *Hale*, that a juſtice of the peace may take a voluntary recogniſance or information, out of his proper county; for though he has no juriſdiction there, and it may therefore be ſaid to be *coram non judice*, it will bind the party, being a voluntary act. On the ſame ground, it has been held, that a voluntary bond, given in the Spiritual court, by miſtake, which they had no right to take, and was *void there*, was binding at common law. And where executors have been led into a miſtake, and gave bail upon a writ of error, which the law did not require, the court refuſed to diſcharge the recogniſance, and held it good, at *common law*.

2 *Hale* 51. 2 *Hawk.* 37. 3 *Cro.* 212-3.

Folkes v. Doc-minique, 2 *Str.* 1137.

Johnſon v. Laſerre, 2 *Ld. Ray*, 1459.

Theſe are acts, to uſe again the expreſſion of lord *Hale*, of voluntary juriſdiction in an individual, by which the authority of no court is injured or eluded; and which, therefore, are conſidered as obligatory upon the principles of the common law or common juſtice.

The caſe of *Brymer v. Atkins* does by no means contradict this poſition. It was an adverſary ſuit in the Admiralty, in which the appellee, by miſtake of the officer had entered into a *recogniſance*, inſtead of a ſtipulation, to reſtore the full value of the veſſel and cargo, in caſe the decree ſhould be reverſed. The court were

H. Bla. 164.

1793. clearly of opinion, though the ſecurity had been entered in the form of a recogniſance, it ſhould operate as a ſtipulation, and that the Admiralty alone could compel execution upon it. But why, I aſk, could the Admiralty alone compel execution upon this ſtipulation? For this plain reaſon, that interlocutory ſecurities, by way of ſtipulation, on points ariſing in the uſual courſe of buſineſs, are incident to a court of Admiralty; and the ſtipulation by the appellee was evidently of that nature. A
1 *Keb.* 88. prohibition was *refuſed* to a ſuit in the Admiralty, upon a ſtipulation made by order of the court, in a cauſe of which they had cogniſance; though the ſtipulation was collateral and extrajudicial as to the main queſtion; becauſe it was taken according to the *uſual courſe* of the court. The idea is this: wherever the ſtipulation is taken agreeably to the *uſage* and *practice* of the court, in any ſtage of a cauſe of which they have *cogniſance*, it can only be ſued in the Admiralty. But if entered into *voluntarily*, for ſome *extrajudicial* object having no connection with, or relation to any *exiſting* cauſe; ſuch ſtipulation cannot be ſued in the Admiralty; becauſe the court had no right to take it agreeably to their own uſages.

Of this latter kind I conſider the ſtipulation entered into by Meſſrs. *Roſs*, *Lacaze*, and *Mallet*. I hold that the taking it was an act unauthoriſed by the *uſages* of the Admiralty, and wholly unprecedented, having no connection with, or relation to the cauſe then before the court; and that the ſtipulation may ſo far *be* ſaid to be void, and *coram non judice*, that the parties were never amenable thereon in a court of Admiralty. This brings us fairly to the queſtion.

Is a voluntary ſecurity, taken by a court or judge, for an honeſt and lawful purpoſe, upon which no redreſs can be had in the *ſame* court for want of juriſdiction, ſo far a *nullity*, that a ſuit cannot be maintained upon it in any other court? And I apprehend clearly it is *not*. The
2 *Str.* 1137. caſe of *Folkes v. Docminique*, cited before, ſeems to be in point. It is ſo briefly ſtated, according to the cuſtom of the reporter, as to admit of explanation.

The ſtatute 21, *Hen.* 8, c. 5, authoriſes the Spiritual courts to grant letters of adminiſtration, taking ſecurity however for the true adminiſtration thereof. After this,

the ſtatute 22 *Charles*, 2, c. 2, directed the Ordinary, upon granting letters of adminiſtration, to take bonds from the adminiſtrator with ſureties for his faithful adminiſtration according to law. An adminiſtrator with the will annexed, *during the minority of an executor*, happened to give an adminiſtration bond in the Spiritual court, conditioned to return an inventory, to pay debts and legacies; and it became a queſtion afterwards, whether the adminiſtrator could be compelled at law to pay a legacy in a ſuit brought by a legatee upon the bond. The court lay down the poſition, that adminiſtrations of this kind, during the minority of an executor, are not within the ſtatute of *Hen.* 8 ch. 5, and that the adminiſtrator was conſequently not obliged to give bond for the due adminiſtration of the eſtate: nevertheleſs they gave judgment againſt him, and made him pay the legacy. 1793.

This adminiſtration bond was therefore ſo far *coram non judice*, that the party was not obliged to *give* it, and the court had no right to require it. Here then we ſee a voluntary ſecurity, given for an honeſt and lawful purpoſe, on which no ſuit could ever have been maintained in the court that took it (for the Spiritual court cannot hold plea of debt upon bond) nevertheleſs afterwards eſtabliſhed againſt the party in a court of common law. In one circumſtance, this caſe goes beyond that now in contemplation of this court. It might be ſaid, the *bond* was given by miſtake; but the *ſtipulation* was notoriouſly given by the parties with *their eyes open.*

I conceive it to be the general rule of law, that common law ſecurities, taken in one court, may be ſued in another. So we find ſeveral inſtances of recogniſances taken in Chancery being ſued at common law, and no objection ever made to it. And it is merely for the ſake of convenience, *not* that the principles of law require it, that the courts of *Weſtminſter Hall* have, of late years, adopted the reſolution of not permitting bail bonds to be ſued in any *other* court than that, out of which the original proceſs iſſued. 2 *Com. Dig.* 634. 1 *Mod.* 29. *Cro. E.* 608. 1 *Bur.* 642, 3. *Burr.* 1923.

In my view of this cauſe, the doctrine of wrecks has nothing to do with it. For, whether the Admiralty had juriſdiction or not upon the libel filed by the captain for ſalvage, is entirely out of the queſtion. Let this point

1793. be as it may, the intereſt of *Lewis Lanoix* upon a collateral ground, cannot be affected by it. Nothing can be more unreaſonable, than upon the preſent controverſy, between *Lanoix* and the plaintiffs in error, to call upon *Lanoix* to ſhew, that the Admiralty had juriſdiction, on a ſuit brought by the captain againſt the property of *Lanoix*. The very idea is pregnant with injuſtice and oppreſſion. Is *Lanoix* to be reſponſible for the conſequences of the captain's ſuit in the Admiralty, if they had not juriſdiction? Is it right, is it juſt, that he ſhould be ſtripped of his property to the amount of thouſands, becauſe a third perſon, without his orders or knowledge, may have gone into a court of Admiralty, and illegally filed a libel? Upon the ſuppoſition, that the court had no juriſdiction, it would be repugnant to every principle of law and juſtice, to ſuffer the plantiffs in error to avail themſelves of it, and thereby avoid their own voluntary act, to the great injury of an innocent third perſon.—Meſſrs. *Lacaze* and *Mallet* were never *cited* in the Admiralty. They were not parties to the ſuit *depending there*; they went *voluntarily* into court; and aſked a *favour*, which was granted, on their engaging to do an act of *juſtice*, viz. to remit the ſilver to the right owner, whom they ſtated to be *Louis Lanoix*. The juriſdiction of the Admiralty is not the *foundation* of the preſent ſuit; but their going voluntarily into court, and entering into the ſtipulation, which will bind them, independent of every conſideration reſpecting juriſdiction. The plaintiffs in error could not have been compelled to enter into any ſtipulation with regard to the ſilver then in poſſeſſion of the Admiralty; but having done it of choice, and at their own requeſt, the common law proceeding on thoſe principles of integrity and fairneſs, which ought to be the baſis of all laws, demands a ſtrict and faithful compliance with their contract.

With reſpect to the objection, that the declaration recites the proceedings in the Admiralty, and that, therefore, it ſhould appear from *them*, that the court had juriſdiction, I think the recital is ſurpluſage. There was no neceſſity for it. The declaration would have been good, if it had only ſtated the ſtipulation, and the reaſons of giving it. The proceedings on the libel by the captain, form no part of *Louis Lanoix's* title to the mo-

ney: the ſtipulation is the foundation of the demand. It is not the caſe of *ſetting* forth a title *defectively*, but a recital of proceedings immaterial, unneceſſary, and ſuperfluous. The declaration might have ſtated the decree in the Admiralty, the actual delivery of the ſilver, and the ſtipulation, omitting the recital of the proceedings on the libel by the captain; and I think there can be no doubt, it would have been good. We find theſe things are, in fact, ſtated; and they form the *real* title or ground of action ſet up by *Lewis Lanoix*. The caſe of *Ruſton v Aſpinal* cited at the bar, was an action by an indorſee againſt an indorſor, of an accepted bill of exchange, and the declaration omitted to alledge two facts, viz. a demand upon the acceptor, and notice to the defendant of the acceptor's refuſing to pay. The court held, the verdict did not cure theſe objections. Becauſe the declaration upon the face of it, contained no ground of action, and no proof at the trial could therefore make it good; and not being laid, it was not requiſite they ſhould be proved. But in the caſe now before the court, the declaration ſtates every thing neceſſary, and goes further and ſtates what is ſuperfluous. 1793. *Doug.* 654.

Suppoſe on a ſuit by an indorſee againſt an indorſor upon a bill of exchange *not accepted*, the plaintiff ſhould ſet forth in his declaration a demand upon the *drawer*, and notice to the *defendant* of the drawer's refuſing to pay (which, it is ſettled, are not neceſſary in ſuch caſe) can it be pretended, that inſerting this unneceſſary matter would deſtroy the right of the indorſee to recover from the indorſor? *Heylen verſus Adamſon* 2 *Burr.* 669, 670.

It has been ſaid, the declaration does not ſufficiently ſtate, that the ſilver was the property of *Lanoix*.

I do not ſee how it could have been otherwiſe ſet forth. It ſtates that *Lacaze* and *Mallet*, in their memorial alledged it to be his property, that they were his agents, and as ſuch apply to have it delivered to them, for the avowed purpoſe of remitting it to him. It then ſtates the delivery of the ſilver, for the purpoſe aforeſaid, and that the plaintiffs in error acknowledged themſelves indebted to the Commonwealth in the ſum of 6666*l.* 13*s.* 8*d.* in caſe they did not perform the ſaid truſt repoſed in them; and then it aſſigns the breach.

Beſides, I do not conceive it to be material, in the

1793. preſent ſtage of the buſineſs who was the owner. The plaintiffs in error might have ſhewn on the trial of the cauſe below, that *Lanoix* was *not* the owner. The verdict has aſcertained the parties to the contract, and eſtabliſhed the fact, that the ſilver was *never* remitted. It is therefore too late to alledge, that the ſilver might have belonged to ſomebody elſe. If this had really been the caſe, perhaps it would have been ground to have nonſuited the plaintiff, but is certainly no reaſon for granting a new trial or reverſing a judgment.

Lee v. Edwards, 1 *Lev.* 280.

It was further objected, that debt will not lie againſt the plaintiffs in error. I have already obſerved, that the ſtipulation ſhould be conſidered in the light of a mere contract, and, as ſuch, binding upon the *parties*, being a fair and honeſt engagement for the performance of an act in itſelf lawful and moral, and that it could be ſued only at common law. The action is not brought upon *an instrument* of writing; nor is any inſtrument of writing declared on; but it is brought upon a contract to pay a fixed ſum of money, and the agreement or ſtipulation before the judge of the Admiralty is *the evidence* of that contract. We cannot travel out of the record; and it does not appear from the record, that any written ſtipulation ever exiſted. We muſt, therefore, take it to be a parole contract; ſupported by parole evidence. It is a preciſe and poſitive contract by the three plaintiffs in error, and not by Mr. *Roſs alone*, that the ſilver ſhall be committed to *Lanoix*. The queſtion then is this:— Where three perſons, ſay *A. B.* and *C.* own themſelves indebted to *D.* in a ſpecific and aſcertained ſum to be paid to the ſaid *D.* in caſe *A.* and *B.* ſhall not perform a particular act, whether, if the act be not executed by *A.* and *B.* an action of debt will not lie againſt all three upon ſuch contract.

This is exactly the ſtate of the queſtion before the court. Meſſrs. *Roſs*, *Lacaze*, and *Mallet*, on the 4th of *November*, in the year 1783, acknowledged themſelves to owe and to be indebted to the Commonwealth, in the ſum of 4000*l.* ſterling, equal in value to 6666*l.* 13*s.* 8*d.* currency, to be paid to the Commonwealth, in caſe the ſaid *Lacaze* and *Mallet* did not faithfully perform the truſt repoſed in them reſpecting the ſaid ſilver coin. They have not remitted the ſilver, and the

queſtion is, will an action of debt lie againſt them all three. 1793.

It is well known, an action of debt will lie, not only upon a bond, or bill, but on a note of hand, a ſpecial bargain, a parole leaſe, a parole contract, or a verbal bargain to pay a fixed price for a certain parcel of goods. In ſhort, all the law requires to found an action of debt is, that the ſum be fixed and determinate, for which the ſuit is brought. So where the contract is by parole, and depends upon a *condition*, it is equally clear, that debt will lie. As if a man promiſe to pay one 20*l.* if he will marry his daughter; an action of debt lies, without any ſpecialty, if the marriage takes effect. It is brought to compel a ſpecific performance of the contract: but an action of *indebitatus aſſumſit* is to recover damages for the breach of it. *F. N. B.* 120. *Lilly*, 403. 3 *Bla. Com.* 154. *F. N. B.* 120.

The caſe of *Stratton v. Raſtal* was ſtrongly urged on the part of the plaintiffs in error, to prove, that an action will not lie againſt Mr. *Roſs* conſidered in the light of a ſecurity. The caſe there was an action upon an implied *aſſumſit*, brought for money had and received to the uſe of the plaintiff, who, it appears, was the purchaſer of an annuity, for the payment of which the defendant was bound as a ſecurity *with* the perſon who had granted the annuity. The bond and other writings executed to ſecure the payment of the annuity, became void by the plaintiff's neglect to regiſter them; and the action was brought by him to compel the defendant, who was the ſecurity to refund the money. The court were divided in their opinion. *Aſhurſt* thought the plaintiff ought to recover. *Buller* and *Grove* were of a different opinion, upon good grounds; and held that the defendant was ſecurity for the payment of the annuity, not the repayment of the conſideration; and that the plaintiff's own neglect to regiſter the ſecurities ought not to raiſe an implied *aſſumſit*, whereon to charge the defendant, who had never received a farthing, and was not ſecurity for its being repaid. 2 *T. Rep.* 366.

In this caſe the defendant was *not liable*, by the very terms of the contract, for the repayment of the money. But in the caſe before the court, Mr. *Roſs* is not held as a ſecurity, but is equally bound with the other two for the ſafe delivery of the ſilver, and is therefore clearly liable, by the expreſs terms of his own contract.

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It has been objected, that debt will not lie, becauſe Mr. *Roſs* is only collaterally bound; and *Hard's* caſe was cited and relied on; where it is ſaid debt will not lie againſt the acceptor of a bill of exchange, being but a collateral engagement; but that it will lie againſt the drawer, becauſe he is a debtor by the receipt of the money. There is no doubt, the law has been ſo determined by an expreſs adjudication in the Exchequer Chamber, in the 20th *Char.* 2. and that this deciſion has been recognized in the caſe of *Brown v. London.* It appears from this caſe, that in the caſe in the Exchequer, *L. C. Baron Hale*, though he concurred in the opinion, that *indebitatus aſſumſit* would not lie againſt the acceptor of a bill of exchange, could not avoid ſaying, "The law ought to be otherwiſe;" and in *Brown v. London*, juſtice *Twiſden* doubted, and conceived that debt would lie againſt the acceptor of a bill of exchange. After this, I hope I may be excuſed for obſerving, that the reaſons and principles of the determination would ſcarcely bear the liberal diſcuſſion of modern times. Where the acceptor of a bill appears to have funds in his hands belonging to the drawer, can it be doubted that an action of debt would lie on the ground of an acknowledgement, that the acceptor had received and held money to the uſe of the plaintiff? Debt will lie where a perſon has paid money to *A.* for the uſe of *B.* by the *cestui que uſe* *B.* And whether he had funds or not, why might not an action of debt be maintained on the foot of an expreſs *aſſumſit* to pay a fixed and determinate ſum, on behalf of a third perſon?

1 *Salk.* 23.

Hardr 486. 1 *Mod.* 285 *Lev.* 1. *Ventr. Keb.*

1 *Ventr.*

2 *Com. Dig.* 638.

Hart v. Longfitt, 2 *L. Ray* 848.

Nor is it true in fact, that the acceptance of a bill of exchange is a collateral engagement, to pay in default of the drawer. So far from it, that the acceptor is *firſt* liable, and muſt be firſt reſorted to, and it is not neceſſary to ſhew notice to *him* of non-payment by any other perſon. And *Aſhurſt* lays down the ſame poſition with *Twiſden*, that the acceptor makes himſelf the debtor. In conformity to this idea, it has been adjudged, that, where the holder of a bill received intereſt thereon from the drawer, or even a part of the principal, and a written aſſumption for the balance, the acceptor was not diſcharged even in theſe caſes. So little countenanced by modern deciſions is the notion, that the acceptor of a

Dingwall v. Dunſter, *Doug.* 249.

Ellis v. Galindo, *Doug.* 250.

bill is only collaterally bound for the payment of the money. 1793.

Let the law, however, upon this point be as it may; for it is not neceſſary now to determine it; debt upon an accepted bill is not like the caſe before the court. For Mr. *Roſs* is bound, in the ſame manner, in the ſame terms, and to all intents and purpoſes, as firmly as *Lacaze* and *Mallet*; and we are to ſuppoſe, after verdict, the contract to be proved as ſtated in the declaration. As well might a co-obligor ſecurity pretend, that debt would not lie againſt him, in conjunction with the principals, becauſe he had not *actually received* the money, and was only ſecurity for the payment of it.

Upon this ſubject, I take the rule to be, that, wherever the defendant, by the expreſs *terms* of the contract, is only a guarantee on behalf of another, there debt will not lie againſt him, being only collaterally bound, but a ſpecial action on the caſe. But where he abſolutely engages, and ſays *I will pay you*, there debt lies againſt him. And no doubt two or three perſons may ſo contract, or bind themſelves, to pay a certain and fixed ſum, though one *only* receive the conſideration, that debt will lie againſt them all. This principle is every day recognized by experience, where the contract is in writing; and there is no reaſon why there ſhould be a difference, where the contract is by parole, and to be void, in the event of two of them doing a particular act. 2 *L. Ray* 842.

Can it be ſaid, in this caſe, that Mr. *Roſs* is only guarantee? Does he engage that if *Lacaze* and *Mallet* do not remit the ſilver, *he* will do it for them, or be reſponſible for the conſequences? By no means. If this were the caſe, I admit he would be only *collaterally* bound, and that debt would not lie againſt him. But the contrary is apparent, as we are now to ſuppoſe the contract to be proved as laid in the declaration: from which it appears, they are all principals, all equally and jointly engaged, one as much as the other. And certainly, they are not the leſs principals, becauſe the *debt* might have been avoided, by two of them complying with the contract.

It has been objected, that ſuſtaining this ſuit in a court of common law will render *lands* liable; whereas, in the Admiralty, the *perſon* only can be impriſoned.

1793. This objection, it must be owned, is ingenious and refined. But surely the different *modes* of execution in the different courts can not destroy a subsisting *right of action* in either. *Lanoix*, like every other creditor, should have the utmost benefit of his suit in that court, in which the law enables him to maintain his action. But the objection proceeds, in fact, upon mistaken ground. For, as Mr. *Ross* was never answerable in any *other*, than a common law court, it is impossible, that bringing a suit against him, in that court in which alone he was liable to be sued, can ever be considered as changing the *nature* of the security or contract.

On the part of the plaintiffs in error, it was said, the action would not lie, as the consideration was past or executed, at the time of the promise.

There is no necessity to go into the nice and hair-breadth distinctions to be found in the law-books upon this point. It is sufficient to refer to the case of *Hayes v. Warren*, and what is said of it in the case of *Pillans v. Van Mierop*. There justice *Wilmot* lays it down as settled, "that where the act is done *at the request* of the person promising, it will be a sufficient foundation to graft the promise upon," though the consideration be past. And as the *request*, in the case before the court, was the sole motive and foundation for the delivery of the silver, there can be no pretence for saying, the plaintiffs in error are not bound, though the consideration might have been *executed*, at the time of entering into the stipulation.

2 *Str.* 933.

3 *Burr.* 1671.

I think the judgment of the lower court should be affirmed.

SMITH, J.—Under the assignment of general errors, five points are made in behalf of the plaintiff in error, viz.

1. It does not appear by the declaration, that the subject matter of the Admiralty suit was of Admiralty jurisdiction.

2. That the writing purporting to be a stipulation, was not a stipulation, nor such a writing, contract, or obligation, as the court of Admiralty had authority to take, and was therefore void.

3. If it was good as a contract, to bind the parties named in it, no action of *debt* would lie on it.

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4. It is not sufficiently stated, that the silver coin stated in the declaration was the property of *Lewis Lanoix*.

5. If the subject matter of the Admiralty suit was within the Admiralty jurisdiction, it belonged exclusively to the Admiralty to determine on the writing.

I shall consider the first two points together, because they have such a necessary connexion, that most of the reasons which apply to the first will affect the second point or objection.

The Admiralty court has jurisdiction and power to try all maritime cases. Of every thing done on the water below the low-water mark, the Admiralty court has the sole and absolute jurisdiction. Having therefore the natural jurisdiction of things belonging to the sea; but being restrained by statute (15 *R.* 2d as to wreck *of the sea*) the party must come for a prohibition before sentence: for after pleading, and admitting the jurisdiction of the court below, it would be hard and inconvenient to grant a prohibition. 3 *Bla.* 68, 106. 5 *Co.* 107. 4 *Bac.* 249. *Carth* 12 *Burr.* 2037.

Indeed if the want of jurisdiction appears on the face of the proceedings, a prohibition may be awarded after, as well as before sentence. 4 *Bac.* 249.

But the party who applies for a prohibition after sentence, must shew a nullity of jurisdiction on the face of the proceedings. Does the want of jurisdiction appear on the face of the Admiralty proceedings in this case? If a prohibition would not lie, can the plaintiffs in error have the judgment reversed, at this stage? It is very true, that nothing shall be presumed within the jurisdiction of an *inferior court*; but what is expressly averred or alledged to be so. But is the court of Admiralty an inferior court? *Blackstone* mentions it, as one of the four sorts of courts which are of public or general jurisdiction throughout the realm, and not one of the courts of special jurisdiction. It is said to be no court of record, in 3 *Blackstone's Commentaries*, and in many other books. But as the Marshalsea is a court of record, and yet an inferior court, so it does not follow, nor is it any where laid down, that because the court of Admiralty is said not to be a court of record, it is therefore an inferior court. But it is laid down, that, wherever there is a 3 *T. Rep* 654. 3 *Bla.* 38. *ib.* 71, 69.

1793. jurisdiction erected with power to fine and imprison, that is a court of record; and that a court of Admiralty can fine and imprison for a contempt in face of the court. Though it is said that this court cannot assess a fine, because it proceeds according to the course of the civil law, and is, therefore, no court of record; yet it is observed, that it may amerce a defendant for his default in its discretion, and may issue execution for the same of his goods; and (if he has no goods) may arrest his body, within the body of the county. Therefore the court of Admiralty is in the nature of a court of record of an anomalous kind. And although it is said, that a strict recognisance, being an acknowledgment of a debt on record, cannot be taken in a court not of record; yet it operated as a stipulation by the parties to submit to the order of the court. The caution taken by the court of Admiralty, is called a recognisance or stipulation. And in the act of assembly it is called a recognisance, and it is enacted, that, if forfeited, it shall be recoverable in the Supreme court. The preamble mentions recognisances for the use of the Commonwealth, but the enacting clause says all recognisances; moreover on a forfeited recognisance the Commonwealth is only a trustee for the prosecutor. So here the Commonwealth is a trustee for *Lanoix*. Upon the whole, the Admiralty court, if not strictly speaking a court of record, cannot be said to be an *inferior court*, and it sufficiently appears by the declaration, that the subject matter of the Admiralty suit was of the Admiralty jurisdiction, unless that jurisdiction was excluded, because it is said to be *wreck*, which is exclusively of common law jurisdiction; had there been no additional words in the description of the subject matter, it might have been intended legal wreck, but perhaps not necessarily even then; for it is held, that the word *covenanted* does not necessarily import, that it was a contract by *deed*. But here it sufficiently appears from the declaration, that the subject matter was *not* legal wreck, *of the sea*; because the goods were not cast on shore by the sea. A *ship* cannot be *wreck*, if the ship perishes; yet if any of the servants escape, the law saith, that they shall have the custody of the goods. In the present case, the captain escaped, and saved the silver from the *wreck of the ship*. If the ship be lost on the shore, and the goods come to land (so as it be not legal

Salk. 200. *L. Ray* 477. *B. Bla.* 224-6.
8 *Co* 38 *b.* 60 *b.*
1 *Ventr.* 1.
3 *Bla.* 109.
12 *Co.* 104.
13 *Co.* 53.
H. Bla. 186.
ib. 188.
3 *T. Rep.* 270.
3 *Bla.* 108.
L. Ray. 1285—6.
2 *St. L.* 167.
Burr. 2719.
1 *Vez.* 453.
Burr. 2037.
2 *Inst* 167.
5 *Co.* 106.
ib. 107.
1 *Bla.* 293.
2 *Inst.* 167.

wreck) they ſhall be delivered to the merchants, paying ſalvage. From whence it is evident, that the words "ſaved from the wreck of the ſhip," are no more to be underſtood as deſcriptive of legal wreck—wreck of the ſea—goods caſt on ſhore by the ſea, than the words, "a record of a court in Jamaica," were deſcriptive of that ſort of record, to which implicit faith is given in *Weſtminſter Hall.* 1793. *Doug.* 5.

But then it is contended, that the ſilver, having been brought on ſhore by the captain and on his ſuit or libel in the court of Admiralty, proceſs having iſſued from that court, by which the ſaid ſilver had been taken into the cuſtody of the marſhall of that court, the court had exceeded its juriſdiction, and all its acts were *coram non judice.*

In anſwer. By the law of nations, one nation is bound to perform thoſe duties and offices of humanity to another nation (and conſequently to the individuals compoſing it) which the ſafety and advantage of that ſociety require. Theſe duties of humanity are to be performed by the ſtate towards ſtrangers. But if the law of nations antecedent to treaties ſhould be ſuppoſed not expreſſly to inculcate this principle, nor require one nation to perform this duty to another, it is enforced by the 18th article of the treaty of amity and commerce between the *United States* and *France.*—"If any ſhip belonging to either of the parties, their people or ſubjects, ſhall within the dominions of the other, ſtrike upon the ſands, or be *wrecked*, or ſuffer any other damage, all friendly aſſiſtance and relief ſhall be given to the perſons *ſhip-wrecked*, or in danger thereof." To ſimilar ſtipulations in the 16th article of the treaty with the *United Netherlands*, and the 20th article of the treaty with *Sweden*, theſe words are added, viz. "and the veſſels and effects and merchandizes, or the part of them which ſhall have been ſaved, or the proceeds of them, if, being periſhable, they ſhall have been ſold, being claimed by the maſter or owners, or their agents, or attornies, ſhall be reſtored, paying only reaſonable charges, and that which muſt be paid in the ſame caſe, by the proper ſubjects of the country."—The article above recited in the treaty with *France* muſt be conſtrued to be as extenſive in this inſtance, as the *Vattel* 2 *B.* 1 *Ch.* 3 & 4 *ſect.* 3, 213-4. *ib. prelim. ſect.* 11, *p.* 6.

1793. enumerated articles in the treaties with the *United Netherlands* and *Sweden*. At leaſt a narrower conſtruction would have a very ungracious ſound in *European* ears, and would be, in fact, contrary to the law of nations, and to the ſpirit of that treaty made with us by our firſt and beſt friend, by whoſe friendſhip our national exiſtence was preſerved.

The nation being then bound by the ſpirit of the treaty, and the law of nations to give this aſſiſtance and relief; how can it give them but through its courts, and what court ſo proper to take cogniſance of this maritime tranſaction, as the court of Admiralty? Was not this court therefore bound, upon the demand of the captain, to take charge and cogniſance of the ſilver ſo ſaved? If the Admiralty be the moſt proper court by which this office and duty of humanity, this article of the treaty can be performed, it neceſſarily follows, that this court can take ſtipulations from the parties to perform all legal
L. Ray 1296. and neceſſary orders and decrees, which it may make in
H. Bla. 186. the performance of this duty, the exerciſe of the juriſdiction with which it is for this purpoſe neceſſarily inveſted; and the common law courts have no right to
H. Bla. 194. prohibit it from enforcing its ſentence. The condition of this ſtipulation was as legal and equitable, as was that
Str. 1137. of the bond in the caſe of *Folkes v. Dominique*. The ſtipulation can no more be intended to have been by coercion, than that bond. The parties came voluntarily into the court of Admiralty, and, on entering into the
H. Bla. 186. ſtipulation, obtained the ſilver, and ſurely they ſhall not
1 *Atk.* 630. be permitted to deny the effect of that engagement of which they have reaped the fruits.

In anſwer to the objection, that the Admiralty had no juriſdiction, becauſe the ſilver was brought on ſhore by the captain, after being ſaved from the wreck of the ſhip.
1 *Bac.* 624. Where the original matter was done at ſea, and other
Ventr. 173. matters be done at land depending thereon, yet the trial
2 *Lev* 25. *Sid* 320. ſhall be in the court of Admiralty.
1 *Com Dig.* 277 1 *Bac.* 625. Suppoſing, but not admitting, that the caution was not good as a ſtipulation, becauſe the Admiralty had no juriſdiction of the ſubject matter; is not the tranſaction good as a contract at common law, and binding on the parties voluntarily entering into the writing for a valuable and ſufficient conſideration? A contract is defined

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to be "an agreement upon sufficient consideration to do or not to do a particular thing." In this transaction are all the ingredients requisite to form a contract; parties, consent, an obligation constituted upon a sufficient consideration. The plaintiffs in error came voluntarily into the court of Admiralty, and before the judge of that court, offered to enter into this agreement, and did enter into it, upon a sufficient consideration, viz. having the silver delivered to them, which was delivered accordingly. As to them, it was perfectly immaterial, in what manner the Admiralty obtained possession of this money. They had no right to demand it. If *F. Hopkinson*, Esq. had not been judge of the Admiralty, had this money been in his possession as a private individual, and he had delivered it to the plaintiffs in error at their request, on their entering into this engagement, it would have been intended, that he had entered into it as agent for *Lanoix*, from whom it would have been presumed that he had sufficient authority, rather than that the agreement should be construed void, after the plaintiffs in error had reaped the advantage of it.

2 *Ela.* 402. 1 *Powel Contr.* 6.

1 *Powel Contr.* 138. 2 *Brown*, P. C. 249. & *vid Comp.* 290.

If his being judge of the Admiralty did not give additional validity to the contract, that circumstance could not make it less binding on the plaintiffs in error, especially as it had been compleatly executed on the other side. The assent of *Lanoix* must be presumed, the contrary not appearing. Can the plaintiffs in error be permitted to deny the authority of *F. H.* as presumed agent of *Lanoix*, at this stage of the business, (having denied that he had any authority in any other capacity) to enter into the contract.

1 *Powel contr.* 138.

Even supposing *F. H.* had no authority to make the contract, is it not binding on the plaintiffs in error, they having received the full benefit? Suppose a contract made between a person of full age and an infant, it is voidable at the election of the infant; but as to the person of full age, it absolutely binds: a much stronger case than the present.

Str. 938. 1 *Pow. contr.* 38, 51.

As to the objection, that, as to *John Ross*, the consideration was executed or past, a full answer is given by justice *Wilmot*, in the case of *Pillans* and *Rose v. Van Mierop* and *Hopkins*. The law on this head has been melting down to common sense in late times.

Burr. 1671-2. *Cro E.* 59. *Cro. C.* 409.

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3. But it is contended, that, if it was good as a contract to bind the parties named in it; action of *debt* would not lie on it.

F. N. B. 119. *C.* 120. *K.* 121. *B.* 1 *Esp.* 182. 3 *Bac.* 153-4. 2 *Bac.* 13. 4. *Co.* 92b.

A writ of *debt* properly lieth, where a man oweth another a certain sum of money by obligation or by bargain for a thing sold, or by contract, &c.

Before *Slade's* case, debt was the usual remedy for money due on contract. Debt was brought against executors, by a legatee of the third part of the testator's goods, where the *quantum* had been ascertained by the ordinary. Debt may be brought for a sum capable of being ascertained, though not ascertained at the time of the action brought, and it is not necessary, that the plantiff should recover the exact sum demanded. Debt lies on the judgment of a foreign court, although the judgment is not a specialty, and although given by a court proceeding by the rules of the civil law, and not considered as a court of record.

Rastal's Ent. 301. *Comyn.* 286.

Doug. 6, 4-5.

Debt will not lie by drawee against *acceptor*, of a bill of exchange, because it depends upon a particular custom, and is not founded in contract. It binds him by the custom of merchants, but does not raise a duty. But debt lies against the drawer.

1 *Wilf.* 186. 2 *Com. Dig.* 640. *Hardr.* 485. *Salk.* 23. 1 *Esp.* 183.

Instrument intended as a statute staple, not being executed according to the act of parliament, was void as a statute staple; but debt was held to lie on it as an obligation at common law. Debt lies on a judgment of nonsuit in an inferior court, and plaintiff below cannot say that the inferior court had not jurisdiction, because he had chosen it, and the defendant below had been forced into it. So here, after the money had been lodged in the Admiralty, and would have remained there, if the plaintiffs in error had not applied to that court for it, and voluntarily entered into this stipulation or (if stipulation it is not to be called) contract, as a condition of having it delivered to them.

Cro. E. 355, 461, 494, 544.

1 *Wils.* 312.

2 *Com. Dig.* 634. *Buller, Nisi Pri.* 167. *Cro. E.* 644. 1 *Roll. Ab.* 593, *C.* 25. 2 *Com. Dig.* 638.

Debt lies upon every contract in deed or in law, express or implied. If *A.* gives *B.* money to buy any thing for him, and he doth not buy it. Debt lies by *A.* against *B.* for the money. If *A.* pays the debt of *B.* at his request to be paid upon request, debt lies by *A.* against *B.* So if *A.* delivers money to *B.* to be repaid by such a day, or to be safely kept; or to be paid to another, and

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he doth not pay it. If *A.* promiſes *B.* 20*l.* to marry his daughter, and he marries her, he ſhall have debt againſt *A.* Attorney ſhall have debt againſt his client, for money which he hath paid for his client, for coſts of ſuit or to his council, &c. If money be delivered to *A.* to be paid to *B.* *debt lies by B.* If *A.* retains a tylor to make a garment for his own daughter, debt lies againſt *A.* So on a retainer to embroider a gown for his daughter's ſervant. So, though the promiſe be for *the advantage of a ſtranger*; as if a man promiſes to pay ſo much for the education of the children of another. If *A.* promiſes 10*l.* to a ſurgeon for curing another, or to a carpenter to make a houſe for another, he will pay for it, an action of debt or *aſſumſit* will lie in ſuch caſes. Debt lies for every duty created by common law, or by cuſtom.

F. N. B. 120. *K.* 152, 121. 2 *Com. Dig.* 63. *Cro. E.* 880. *Ib. Allen*, 6. *Cro. J.* 521. 2 *Com. Dig.* 638.

But it was adjudged, that if *A.* retains an attorney to proſecute the ſuit of *B.* debt does not lie for the attorney againſt *A.* The reaſon of that, *Holt* ſays, was that the attorney had a remedy againſt the party for whom he acted, notwithſtanding he was employed by the defendant; and indeed the authority of that caſe is here ſhaken, or rather its application is confined, ſo that it cannot weigh againſt the above cited, and many other caſes, in which it has been adjudged, that debt will lie againſt *A.* on his contract in behalf of *B.* for ſervice to be done to *B.* Beſides, is there a ſingle inſtance of an information for money due to the king, which is not in debt, though on ſimple contract? The reaſon probably is, that againſt the king the defendant cannot wage his law.

Cro. C. 107, 194. *L. Ray.* 842. 1 *Roll. Abr.* 593. *C.* 45, 51.

By theſe caſes, and by the following caſes and reaſons, an anſwer is given to the objection, that, ſuppoſing debt would lie againſt *Lacaze* and *Mallet*, it would not lie againſt *John Roſs*, who was only their ſurety, and his undertaking was only collateral. It cannot be ſaid that in this contract his undertaking was collateral. It was ſimultaneous with that of *Lacaze* and *Mallet*, made at the ſame inſtant. It was a joint contract. It was one tranſaction by them all, before the money was delivered by the Admiralty.

1 *Powel Contr.* 349—50.

In the caſe of *Machen* and *Fortune v. Staynton*, the *effect* of an agreement is carried further than the *letter* of it, even againſt a ſurety; which is contrary to the opinion of *Buller* in *Stratton v. Raſtall.*

1 *Brown's P. C.* 87. 2 *T. Rep.* 370.

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It is laid down, that *A.* ſhall have *debt* againſt *B.* who becometh pledge for another, upon his promiſe to pay the money, without any writing made thereof.

F. N. B. 122. *K.*

Under this head it is contended, that no action would lie againſt *John Roſs* the ſurety, who never in fact received any of the money; and the caſe of *Stratton v. Raſtall* is cited in ſupport of this poſition. But (admitting that caſe to be law) it is clearly diſtinguiſhable from the preſent. There the plaintiff, by his own act, loſt the benefit of the expreſs contract. By his neglect, it was relinquiſhed, and became extinguiſhed; and the ſurety, not having received any part of the money, was not liable upon the implied contract, which could be ſupported only upon equitable principles. There the defendant was only ſurety for the payment of the annuity; not for the repayment of the conſideration money, for which the action was brought; but in the preſent inſtance, the expreſs contract of the defendants was, that the money ſhould be delivered to *Lanoix* or the right owner. No act was done by the other party to relinquiſh or nullify this expreſs contract, for the nonperformance of which the preſent action was brought. On this point let me repeat the words of *Aſhurſt*, "I have ſo great a veneration for the law, as to ſuppoſe, that nothing can be law, which is not founded in common ſenſe, or common honeſty."

2 *T. Rep.* 366.

3 *T. Rep.* 62.

4. It is alledged, that it is not ſufficiently ſtated in the declaration, that the ſilver was the property of *Louis Lanoix*. That the truſt of *Lacaze* and *Mallet* was for remitting the money to *Lanoix*, or the right owner, and the declaration does not ſtate, that they did not deliver it to the right owner, which it ought to have done.—Thus, it is ſaid, every word of the declaration may be true, and yet the truſt performed.

Anſwer. This ſuit is in the name of the Commonwealth as truſtee for *L. Lanoix* or the right owner. It was not neceſſary to ſtate more particularly, that the ſilver was the property of *L. Lanoix*. If it had not been his property, and the defendants had delivered it to the right owner, they ought to have pleaded that.—In an action on a promiſſory note payable to *A.* or order, or on a bond payable to *A.* or aſſigns, brought by the payee, does he ever aver that the defendant did not

1 *Salk.* 25.
1 *Salk.* 139.
12 *Mod* 86.
5 *Mod.* 133.

pay the ſame to his order or aſſigns? If aſſigned, that must come on the other ſide. 1793.

Were ſuch averment neceſſary, the want of it is cured by the verdict. Many inaccuracies and omiſſions which would be fatal, if early obſerved, are cured by a ſubſequent verdict. For if a declaration or plea omits to ſtate ſome particular circumſtance, without proving of which at the trial, it is impoſſible to ſupport the action or defence, this omiſſion ſhall be cured by verdict. In other words, the general rule is, that where a thing is ſo eſſentially neceſſary to be proved, that if it had not been given in evidence, the jury could not have given ſuch a verdict, there, though it is not ſtated in the declaration, yet this defect ſhall be aided by the verdict. The authorities which ſupport this principle, alſo ſubſtantially anſwer the firſt objection.

L. Ray 1061. *Str.* 931. 3 *Bla.* 394. *L. Ray* 109. 12 *Mod* 510. *Carth.* 389. *Hard.* 117. *Buller* 2020. *Buller* 167. *Comyn.* 825. *Doug.* 658.

5. It is contended, that, if the ſubject matter of the Admiralty ſuit was within the Admiralty juriſdiction, it belonged to the Admiralty excluſively to determine on the writing,

I ſhall conſider this objection, 1. Suppoſing the writing to be a ſtipulation which the Admiralty had authority to take; and, 2. Suppoſing it to be no ſtipulation becauſe the Admiralty had no authority to take one, I will conſider it as a contract at common law.

In *Brymer v. Atkins*, lord *Loughborough* ſays, that, "Operating as a ſtipulation, execution of it belongs to that juriſdiction to which the parties have agreed to ſubmit."

H. Bla. 189.

That all proceedings legally commenced in any court to which *the parties have agreed to ſubmit*, may be more properly carried into execution by that court than by any other, and that no ſuperior court ought to prohibit the inferior court from carrying ſuch proceedings into execution, unleſs when authority is expreſſly given to the ſuperior court for this purpoſe, ſeems not to admit of diſpute, when the party intitled to the effect of thoſe proceedings applies to the inferior court to have them carried into execution; but does it follow, that, if the party intitled to ſuch effect chooſes to apply to a ſuperior court of common law and general juriſdiction, the ſuperior court is precluded from carrying into effect any of the acts of the inferior court? Does this follow eſpecially

1793. where the party applying had been forced into the inferior court? If the party who had chosen the Admiralty jurisdiction, in which to institute a suit, should be confined to that court to the conclusion of the transaction, does it follow, that the other party, who had been forced into it, should be thereby deprived of his election of applying to the courts of common law, and of trial by jury, to carry into effect a stipulation taken in the cause, by the Admiralty, and so deprived without the intervention of positive law, or any solemnly adjudged case? I think the affirmative cannot be supported. It is even admitted, that debt lies in the court of Common Pleas on judgment on *scire facias* on a recognisance in the court of King's Bench.

2 *Com. Dig.* 634, *Dy.* 206a. *in marg.*

Bail bonds must be sued in the same court in which the bail was given, because the statute directing the assignment of them gives the court, after such bonds are put in suit, an equitable jurisdiction to stay proceedings, and to let the defendant in to try the merits of the original action upon reasonable terms; which jurisdiction cannot be exercised unless the proceedings on the bail bond, and the original action were in the same court. But even in this case, upon special circumstances, as if the defendant lives out of the jurisdiction, the bail bond may be sued in another court.

Barnes 92, *Bla.* 877, *Burr*, 1023, 642. 3 *Wils.* 548.

Burr, 642.

Debt lies in the King's Bench upon a recognisance taken in Chancery, although the plaintiff had before sued a *scire facias* in Chancery on it, obtained judgment there, and sued an *elegit*.

Cro. E. 608, 817.

Debt lies in the court of Common Pleas, on a judgment in the Mayor's court at *Guildhall*, on a recognisance taken before the mayor, &c. And lord *Anderson* said, admit the recognisance was not well taken, yet because that, on the *scire facias* upon it, the defendant did not take advantage of it, he shall be bound by his said admission.

1 *Leon.* 284. 2 *Com. Dig.* 635, *Dy.* 219.

Debt lies in the King's Bench on a judgment of nonsuit in an inferior court, and it is not necessary that the now plaintiff should aver, that the inferior court, into which he had been forced, had jurisdiction of the subject matter of the original action.

1 *Wils.* 316. *Cro. E.* 56.

Debt lies in the Marshalsea, or any other court (of record as stated by *Comyns*) on a judgment in the court of Common Pleas or King's Bench.

1 *Salk.* 209. 2 *Com. Dig.* 634.

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Debt lies in the court of King's Bench on a recognisance (of bail it was here) taken in the court of Common Pleas. And on judgment on *scire facias* on recognisance in the King's Bench, debt lies in the court of Common Pleas. 6 *Mod.* 132. 7 *Ven.* 349. 2 *Com. Dig.* 34 *Dy.* 300, *in marg.*

Debt upon a judgment for debt or damages in a court of *London*, by special custom lies in the court of King's Bench or Common Pleas, though the original action could not have been brought there. 2 *Com. Dig.* 634. 1 *Rol. abr.* 600, *l.* 45.

Bond taken by the Admiralty to perform their orders, it should be sued at common law. It is true, the book in which this is stated, is not of much authority; but is there any adjudged case contrary, or is this case contradicted by any judge? It is said *arguendo*, that a strict law recognisance, upon which a *scire facias*, or action of *debt*, or an *extent* might be brought, could not be taken by a court not of record. But the court only says, "that execution of it belongs to that court, and that jurisdiction, to which the parties have agreed to submit." Besides this was in the case of *prize*, in which the Admiralty has the sole and exclusive jurisdiction. 1 *Keb.* 88. *H. Bla.* 174. *ib.* 189. 3 *T. Rep.* 270.

In answer to the many instances of actions being brought in different courts on judgments of other courts, it is said, that is because all such suits may be removed thither before judgment. This answer is not sufficient. An action cannot be removed from the court of King's Bench to the court of Common Pleas, nor from a foreign court to either, nor from either to the Marshalsea.

It is also said, that if the Admiralty had authority to take such a stipulation, it had also authority to enforce it; that there is no instance of any such action having ever been brought in the courts of common law, which is an argument that none will lie.

That every court has authority to enforce its own decrees and acts, is a position supported by reason, law, and practice; but it does not follow that it has the exclusive authority. The contrary is evident from the cases cited on this head. Indeed as this stipulation was to indemnify the judge and officers of the Admiralty, it would have been judging in his own cause, had he enforced it in that court.

To say nothing of the prohibitory act of assembly, it is not too strong an expression to say, that even an act 1 *St. L.* 35. *Hob.* 87. *Holt* 396.

1793. of the legiſlature giving this power to a judge, would be void.

Salk 397, 607 *Str.* 1173. *Hardr*, 503 *F N.B.* 7 *B.* Beſides, the Commonwealth may ſue in what court it pleaſes. The king may bring a *quare impedit* in the King's Bench.

32 *E* 4 *Inſt* 17 *Plowd.* 244a. 4. *Bac. abr.* 203. No authority was cited in ſupport of the poſition, that becauſe no ſuch action has ever been brought, therefore none will lie. *Lit.* ſect. 108, *Co. Lit.* 81, and *Black.* 309, are uſually cited in ſupport of this argument.

Lord C. J. *Holt*, was ſufficiently attached to form, and leaned enough to formal objections; ſo far at leaſt, as appeared neceſſary to eſtabliſh certainty and preciſion in practice; yet we find, that when it became his duty to apply general principles to new occaſions, his great, comprehenſive, acute, pervading and intuitive mind, was not fettered by form, eſpecially when an adherence *Towp.* 276. to it tended to entangle juſtice in a net of law, and a departure from it did not weaken any of thoſe fundamental principles, upon which the ſecurity of property depends, and which ought therefore to be holden ſacred. He ſays *L. Ray.*, 957, *6 Mod.* 56. "it is an argument, when founded on reaſon, but none when it is againſt reaſon." He conſiders *Littleton's* opinion, and ſays, "it has no great force. If it had, it would have been deſtructive of the many new actions, which are at this day held to be good law." And he cites many inſtances of new actions grounded on the common reaſon, and the antient juſtice of the law. And *2 Wilſ.* 146. lord *Camden* ſays, "I wiſh never to hear this objection *See Hargr. Co. Lit.* 81b. again." And *Littleton* himſelf adds, "*ſed quære de hoc.*" *Holt* further ſays, "We muſt not be frighted when a matter of property comes before us, by ſaying, it belongs to *L. Ray.* 957. (another juriſdiction) the parliament, we muſt exert the *6 Mod.* 56. queen's (the Commonwealth's) juriſdiction."

L. Ray, 957. If, therefore, we conſider, that the law does not conſiſt in particular inſtances or precedents, but on the reaſon of the law, we ſhould not be warranted by the reaſon of the law, any more than we are by adjudged caſes, in holding, that no action would lie, in the preſent inſtance, at common law; or that an action of *debt* would not lie at the ſuit of the Commonwealth, ſuppoſing the writing to be a ſtipulation.

If it ſhould not be conſidered as a ſtipulation, but a contract at common law, I think, there cannot be a doubt,

for the reaſons given under the third head, but that an action of debt is maintainable in a court of common law. We cannot reverſe the judgment, unleſs we are clear, that ſuch action would *not* lie. 1793.

Had I any doubts as to the form of this action, I would ſay with lord *Mansfield*, that judges ought to lean againſt objections, which have no relation to the real merits, much more when the plaintiff is clearly entitled to recover on the merits, and muſt recover in another action. *Burr.* 1243. *H. Bla.* 241. *Burr.* 2588.

I am, for theſe reaſons, of opinion, that judgment be affirmed.

ADDISON, J. Though the ſtate of Pennſylvania, by its officers of the Admiralty, had poſſeſſion of this coin, yet, having preſcribed forms and limits to the exerciſe of its ſovereignty, its officers can execute only thoſe portions of power, and in that manner, which the law preſcribes to them. The court of Admiralty, therefore, though the agents of the ſtate, may be ſuppoſed to have taken, exerciſed, and ſurrendered the poſſeſſion of this coin, by authority, without authority, or againſt authority; and may therefore be conſidered as acting judicially within their juriſdiction, or as innocent poſſeſſors, or as treſpaſſers. Even treſpaſſers may take a promiſe, from a third perſon, to reſtore to its true owner, the property, which is the ſubject of the treſpaſs; and this promiſe may bind the perſon who makes it; for the reſtitution is a lawful act. Innocent purchaſers may ſurely do ſo, and ſuch promiſe, to them, will be free from all objection. But ſuch promiſe made judicially, to a ſovereign ſtate, through its officers, acting judicially upon a ſubject within their juriſdiction, and made the condition of their parting with a poſſeſſion, which they acquired, held, and ſurrendered, judicially, by authority, and due form of law, muſt be conſidered as binding with peculiar force.

As the principles of our government hardly warrant a diſpoſition to indulge the prerogative of adminiſtering juſtice, in one form, to the ſovereign, and in another, to the citizen; but ſeem to require the application of one rule to all; ſo neither, without ſome reaſon of policy or juſtice, ſhould a promiſe made to a ſtate, acting in its judicial capacity without authority, be held leſs binding, than if made to a citizen acting as a treſpaſſer.

1793. In my examination of the errors aſſigned on this record, and the arguments thereon, I have been led to arrange them in four points of view.

1. Is a ſtipulation taken regularly and judicially, by the court of Admiralty, acting on a ſubject within its juriſdiction, a ſufficient ground of an action of debt, in a court of common law?

2. Is the ſtipulation ſtated on this record to be conſidered here, as taken regularly and judicially, by the court of Admiralty, acting on a ſubject within its juriſdiction?

3. Is this ſtipulation independent of all judicial circumſtances, ſuch a contract, as will maintain an action of debt, againſt *Lacaze*, *Mallet* and *Roſs?*

4. Is a breach of this ſtipulation ſufficiently ſet forth in the declaration?

Theſe queſtions ſeem to involve all the diſputed points in this caſe.

1. Is a ſtipulation, taken regularly and judicially, by the court of Admiralty, acting on a ſubject within its juriſdiction, a ſufficient ground of an action of debt in a court of common law?

Vinn. Juſt. Inſt. 553-4. A ſtipulation, in the Roman law, is a promiſe, conceived in a ſet form of words, which binding without any writing or conſideration, was frequently annexed to contracts, which without it, would not be binding, to render them ſo; or to contracts of themſelves *ib.* 571-4. binding, to render them yet more ſolemn.* Stipulations were either voluntary, when entered into from the mere conſent of the parties, or neceſſary, when interpoſed by judicial authority, either in the courſe of a ſuit, to ſecure its effect, or without ſuit, to accompliſh a ſummary remedy. When any thing was ſtipulated *ib.* 564-5. to be done, or not done, it was uſual to annex a penalty, which, in caſe of a breach of the ſtipulation, might be the meaſure of the damages, and prevent any diſpute, trial, or aſcertainment. And, in all kinds of obligations, there might be *fidejuſſors* or ſureties, whoſe obligation *ib.* 594-9, might alſo precede or follow that of the principal; but,

* In the Roman law, the ſtipulator was the perſon requiring the promiſe: with us, the perſon promiſing is uſually called the ſtipulator. *Wood's Inſt. Civ. Law*, 220-4.

by a regulation introduced by *Justinian*, they were not to be called on till after the principal, if he was ſolvent and to be found: yet this ſeems not to have extended to ſtipulations by judicial authority, nor perhaps to mercantile tranſactions; and, in all tranſactions, to which it did extend, it became uſual to inſiſt, that the *fidejuſſor* ſhould expreſsly renounce this benefit. 1793.

Stipulations, ſo frequent in the civil law, were naturally adopted by a court, whoſe principles and proceedings were, in a great meaſure, regulated by that law. Analogous to recogniſance of bail, at common law, ſtipulations were uſed, by the court of Admiralty, to enforce compliance with its proceſs and decrees. When the Admiralty went farther than mere analogy, and allowing its ſtipulations the force of a recogniſance in a court of record, endeavoured to proceed on them as ſuch, the courts of common law prohibited them, and would not ſuffer this court of ſpecial juriſdiction, to aſſume to itſelf the authority of a court of record, and bind the eſtates of the ſubjects of the realm. At laſt however, from the neceſſity of allowing the Admiralty to ſupport its juriſdiction, and enforce its authority, the courts of common law, though they held, that a ſtrict recogniſance, an acknowledgement of a debt on record cannot be taken in the Admiralty, a court not of record; yet a ſtipulation, though in the form of a recogniſance, having none of its attributes, nor to be proceeded on as ſuch, nor like it, in its conſequences, might be taken there, and that, as the courts of common law will, in a ſummary manner, enforce compliance with any rule incidentally made in the courſe of their proceedings (a rule to ſtay waſte, for inſtance, in the proceeding in ejectment) ſo a court of Admiralty, acting judicially, on a ſubject within its juriſdiction, may, as a proper and convenient mean of executing its authority, adopt and enforce a ſtipulation, which being an undertaking of the party, to ſubmit himſelf to the authority of the court, execution on it belongs to that court, and that juriſdiction, to which he has expreſsly agreed to ſubmit.

3 *Comm.* 108, 109, 291.

H. Bla. 188.

Ld. Ray. 223, 235, 1285. *H. Bla.* 185, 189. 3 *T. Rep.* 329, 343. *Stat.* 13. *R.* 2. *c.* 5, 15. *R.* 2, *c.* 3.

The motions for prohibitions, to the proceedings of the court of Admiralty, on ſtipulations, ſeem to have been made, on the ground, that they were proceeding on a contract made at land, and the prohibitions, when

Caſes laſt cited. 1 *Bac abr.* 627 *Carth.* 26. *Hardr.* 473, *denied* 2 *Str.* 890.

1793. granted, ſeem to have been granted on that ground, as well as on their uſurping the appearance and effect of a recogniſance of record. But, notwithſtanding the prohibitions, I have not been able to diſcover any ſuit at
3 *Mod.* 245. common law on a ſtipulation. *Pollexfen*, arguing, in the court of King's Bench, againſt a prohibition, ſays, "It is not new, that things ariſing on land may be ſued for in the Admiralty, for ſo it is in all caſes of ſtipula-
2 *Ld. Ray.* 1285. tions." *Dr. Lane*, an eminent civilian, arguing, in the ſame court, againſt a motion for a prohibition to the proceedings of the Admiralty on a ſtipulation, by part owners, for the ſafe return of a ſhip,* ſtates, that, "if ſuch prohibition were granted, the court of Admiralty would ſignify nothing, becauſe moſt of their proceedings are, by taking ſuch ſtipulations, and there could be no remedy on them at common law." This reaſoning ſeems
H. Bla. 185. to have prevailed. The counſel arguing, in the court of Common Pleas, for the demurrer to a declaration in prohibition to proceedings in the Admiralty on a ſtipulation, ſeem to ſtate it as eſtabliſhed by the caſes cited on the other ſide, that land cannot be affected, nor an action of debt be brought on a ſtipulation, like the one now in queſtion, with a penalty to the king. In the ſame caſe, lord *Loughborough* ſays, that ſuch a ſtipulation has none of the attributes of a recogniſance, cannot be proceeded on as ſuch, and is not like it, in its conſequen-
3 *T. Rep.* 333. ces. In argument, in the King's Bench, againſt a prohibition, the counſel ſtate, that in an action of law, by the owners of a ſhip taken as prize, againſt the captors (the court of Admiralty having decreed, that the ſhip was not a prize) lord *Mansfield* nonſuited the plaintiff; becauſe the queſtion aroſe out of a prize cauſe, and courts of Admiralty ought to enforce their own decrees. In the court of Common Pleas of *Philadelphia*, in a caſe of the ſame kind, preſident *Shippen* uſes almoſt the ſame expreſſions, in giving the opinion of the court, that the action could not be ſuſtained; becauſe, to ſuſtain it, would be to carry the decree of the court of Admiralty

* This was the point before the court in *Carth.* 26, and *Hardr.* 473. and though the Admiralty juriſdiction was there denied, it ſeems to have been allowed here, and more pointedly in 2 *St.* 890: ſo it finally prevailed.

into execution, which (the Admiralty being the proper judicature to carry into effect its own decrees,) he declares, the court of Common Pleas had no authority to do. The principles of this decision are fully explained in the case of *Le Caux v Eden*. Such suit could not be supported because it arose out of the question, "prize or not prize," which, with all its consequences, depending on the rights of war, part of the law of nations, belongs entirely and exclusively to the courts of Admiralty; and as the courts of common law cannot, at all, enquire into it, they can receive no evidence of it, not even the evidence of the decree of the competent court. In this case of *Le Caux v. Eden*, the counsel for the plaintiff contended, with great earnestness and warmth, for the benefit of a common law redress. But no suit of this kind having ever been brought was a strong argument, that none could be supported, and as the Admiralty had full authority to remedy an unlawful capture, and all its consequences, the court thought, it would be extremely inconvenient to withdraw this question or any of its incidents, from a jurisdiction proceeding on a general law of all nations, and in a summary and equitable manner, and bring it before a jurisdiction governed by a limited municipal law, and proceeding with a formality and mode of proof ill suited to the nature of the subject. If captors were liable to a suit at common law, by every person affected by the capture, none would venture to take a prize. And if foreigners had no remedy, for injuries done to their property, under colour of prize, but from suits in our courts of municipal law, to the principles and effects of which they are strangers, mutual confidence between nations would be destroyed, and, in a war between any two nations, all others would protect themselves by force, and compel by arms that administration of justice, to which they are reciprocally entitled. 1793. *Doug.* 572, 597.

This collection of opinions and decisions, respecting the court of Admiralty, shews the extreme caution, with which courts of common law interfere with the jurisdiction of that court; and shews, that its jurisdiction, in cases of stipulation, though, at first interrupted and denied, was, at last acknowledged. The conclusion to *Hardr.* 473. 2 *Ld. Ray.* 1285. 2 *Str.* 830.

1793. be drawn from this is, that every argument, which ſupports its juriſdiction, bears againſt the juriſdiction of the courts of common law.

But it may be ſaid, that the doctrine, reſpecting the prize court of Admiralty, is not concluſive, when applied to the Inſtance court, with which the courts of common law have, in many caſes, a concurrent juriſdiction. It will, however, be obſerved, that, of the authorities cited, many are in the Inſtance court, and that there, the reaſons of inconvenience, in all, have great influence. The ſea, if I may ſo expreſs it, is the *territory* of all nations; and as tranſactions are to be governed by the *lex loci*, things happening on it are to be governed by the law of nations, rather than any municipal law. Therefore courts of Admiralty are inſtituted in all ſtates, and governed by the ſame code of laws.—But why inſtitute them, if every incidental occurrence may be drawn into a court of municipal law? Foreigners may frequently be affected by things happening on the ſea, the highway of the world, and have like reaſons to demand the maritime mode of inveſtigation in other caſes, as in the caſe of prize. Their ſituation may not admit delay. The mode of proof and trial, by the municipal law, framed for internal tranſactions, may, with reſpect to maritime affairs, be impracticable or inconvenient, and will generally be unknown. And it may ſeem hard, after commencing, ſupporting, and concluding a ſuit in the Admiralty, to be drawn into a court of municipal law, for the attainment of its object, or an enquiry whether it has been attained or not. If the court of Admiralty have juriſdiction over the principal matter, it will alſo have juriſdiction over the incidental, and may enforce compliance with the ſtipulation. If it had no juriſdiction over the principal matter, any incidental judicial act is void. In any caſe, the application to a court of common law ſeems to be, at leaſt, unneceſſary, and may be oppreſſive. It appears to be new, and, if its tendency be improper, it ought not to be countenanced.

But here it is urged, that application to a court of common law was neceſſary to obtain the advantage of this ſtipulation; for one of its conditions is to indemnify the judge and officers of the Admiralty, and

unleſs the courts of common law will enforce this, he must judge in his own cauſe, which is impoſſible. Now, although the breach of this condition is not averred, and this cannot be a ſuit on it, yet the judge of Admiralty had an intereſt in this ſuit, if the delivery of the money to *Lacaze* and *Mallet* was not a judicial act: for, if it was not, he was anſwerable for it; and if he could oblige them to pay it over to *Lanoix*, he would ſave himſelf. 1793.

It may alſo be ſaid, that to remit the party for remedy on this ſtipulation, to the court in which it was taken, may be to deny all remedy; for that court no longer exiſts, and its authority is veſted in the courts of the *United States*.

Here then, it is alledged, is a reaſonable, if not a neceſſary, ground for a ſuit at common law on this ſtipulation. And where there is a reaſonable and neceſſary ground for a ſuit at common law, why ſhould not an action of debt lie on a ſtipulation, as well as on a judgment in a foreign court? There is no adjudged caſe to the contrary; and the boundaries of actions are every day enlarging. Such an action of debt, it is true, will not lie on it, as on a recogniſance or judgment in a court of record. It is not of ſuch ſolemnity, as to be anſwered by the plea of *nul tiel record*; nor is it perhaps of ſuch abſolute verity, as to be concluſive at the time, and not to be denied or examined. Yet it may be ſaid, that, though it be not an acknowledgment of a debt on record, it is an acknowledgment of a debt, which, if for an honeſt and good conſideration, may be recovered at law. A recogniſance of bail, in any action in any court, though an incidental tranſaction, may yet be the ground of another action in another court. And by an act of aſſembly, paſſed ſince this ſtipulation was taken, forfeited recogniſances in the Admiralty, or Admiralty ſeſſions, ſhall be ſued for in the Supreme court. 2 St. L. 167.

But, ſuppoſing this reaſoning to lead to a concluſion, that a ſtipulation regularly and judicially taken by the court of Admiralty, acting on a ſubject within its juriſdiction, may be a good ground of an action of debt at common law; we muſt, before we decide the caſe before us, diſcuſs the ſecond queſtion.

1793.

2. Is the ſtipulation ſtated on this record to be conſidered here as taken regularly and judicially, by the court of Admiralty, acting on a ſubject within its juriſdiction.

It is ſaid, that it is not; for the ſubject was wreck, of which the Admiralty had not juriſdiction.

Wreck, or *wreck of the ſea* in the ſtrict technical ſenſe of wrecked goods, which the ſea caſts upon land, is excluded from Admiralty juriſdiction. But there is another more lax ſenſe, in which it is uſed, for *ſhip wreck*, or wrecked goods in general: and, in this ſenſe, it includes *jetſam*, *flotſam*, and *ligan*, which are ſubjects of Admiralty juriſdiction. The word *covenant*, though commonly, does not neceſſarily, import a contract by deed. The word *legacy* has been held to extend to land. So the word *wreck*, though properly meaning wrecked goods caſt on land, has been uſed judicially and by lawyers, for wrecked goods at ſea. In the judge's report of a trial in trover, for part of the cargo of a ſhip foundered, and *never heard of*, the *ſhip* and goods are mentioned as a wreck. Lord *Hale*, in a treatiſe *De Jure Maris*, ſays, "of wreck of the ſea there are two kinds: 1, ſuch as is called properly ſo, goods caſt upon the land on ſhore; 2. improper, for goods that are a kind of ſea waifs, or ſtray, flotſon, jetſon, and lagon."

1 Powel contr. 244. 4 *Burr.* 2035—9. *1 Burr.* 271. 3 *T. Rep.* 720—1.

Hamilton v. Davis. 5 *Burr.* 2732.

Collect. Jurid. 37.

If on ſuch occaſions, and by ſuch perſons, the word *wreck* has been uſed in this general ſenſe, ſhall we wonder, if *Lacaze* and *Mallet*, in their petition to have this money delivered to them, ſhould uſe it in the ſame ſenſe, and that it ſhould have crept, by way of parentheſis, into the order for the delivery of the money to them? It is not ſhewn to us in the libel of the maſter, on which the court took juriſdiction, nor in any other part of this record. And, even where it is uſed, it is evident, that it is not uſed in the proper, but in the improper ſenſe. It is wreck of the *ſhip*, and not wreck of the *ſea*. I cannot therefore bring myſelf to ſay, that this record expreſsly excludes the juriſdiction of the Admiralty; for it does not ſo manifeſtly appear. Is it then neceſſary, that it expreſsly and ſufficiently ſtate this juriſdiction?

It is ſaid, that this is neceſſary; for the court of Admiralty is not a court of record. And it is ſaid, that this is not neceſſary; for the court of Admiralty is not an inferior court, and, in ſuperior courts, the juriſdiction is preſumed.

Many inferior courts are courts of record; and though the court of Admiralty be not a court of record, it may not, therefore, be an inferior court. 1793.

The equity court of Chancery is not a court of record; and ſurely, it is not an inferior court. In this reſpect, the court of Admiralty is not an inferior court, that its ſentence, on ſubjects within its juriſdiction, is not examinable in the ſuperior courts of common law. But, in every reſpect, it is not ſuch a ſuperior court, as, like the courts of *Weſtminſter Hall*, its juriſdiction is general and preſumed, without averment. As to ſubject and place it is limited: and every libel in the Admiralty muſt lay the cauſe of ſuit to be within the maritime juriſdiction, and ſo as it may appear to the courts of common law to be ſo indeed; "for a man is not to ſue in the Admiralty becauſe it is a ſhip." 2 *L. Ray.* 1252, 1452. 1 *L. Ray.* 272. *Hob.* 212. *Doug.* 615.

But it is contended, that the juriſdiction of the Admiralty does appear; for this is a caſe of ſalvage. Together with the ſhip, the wages of the mariners were loſt, and they contributed to the recovery and ſafety of the goods, as any other individuals, and upon the ſame terms. It is contended alſo, that it is the law of *France*, and for the mutual convenience of all nations, that, in all ſuch caſes, the property ſaved ſhall be depoſited in the Admiralty, ſubject to its juriſdiction; and that, the parties being citizens of *France*, it was expected on both ſides, that this ſhould be done, and that a decent reſpect for the laws of *France*, and regard for general convenience ought to ſanction this juriſdiction. I feel no inclination to oppoſe this reaſoning; and I think this was a proper exerciſe of Admiralty juriſdiction, warranted by the cuſtom of *France* and other nations, advantageous to the parties concerned, and neceſſary in all maritime countries, for the protection of foreign property: and I think, therefore, that this juriſdiction ought not to be diſputed with the Admiralty, and that it ought to be conſidered as acting judicially in the exerciſe of it. *Molloy. B.* 2, *C.* 2, §16.

If, together with juriſdiction, there muſt alſo be an averment of juriſdiction, I cannot think this ſufficiently implied in the recital of the order of the Admiralty to deliver the coin to *Lacaze* and *Mallet*, on their giving caution, "agreeably to the practice and uſage of that

1793. court, and the laws of this ſtate;" theſe words referring to the manner of the caution, not the matter of the ſuit.

9 Co. Rep 47a. 6 Co Rep. 30b. Syſtem of Plead. 184. And, in ſome caſes, averments, though falſe and not traverſable, as that a plaintiff in the Exchecquer is a king's farmer, muſt be made. So, to found an action at law, on a judicial proceeding in the Admiralty, an averment may be neceſſary, in the declaration as in the libel, that the ſubject was within the juriſdiction of the Admiralty. For, though it be a rule, that, if a party, having an opportunity to object to the juriſdiction of the Admiralty, lies by till after ſentence againſt him; the court of common law will not, in order to prohibit the Admiralty, look out of the proceedings, to find irregularity, and will preſume juriſdiction unleſs want of it appear on the proceedings; yet this is in the caſe of motions for prohibition, where the other party has gone on in the Admiralty under an *apparent juriſdiction*, as on a contract laid in the libel to have been made *at ſea*; and then the court of common law may refuſe to interfere, in oppoſition to a juriſdiction, to which the party has ſubmitted. But if this queſtion come before a court of common law, not on a motion for prohibition, but on a ſuit inſtituted on ſome of the Admiralty proceedings, will the ſame reaſons which induce a court of common law not to ſtop the proceedings of the Admiralty, induce it to enforce them? Becauſe it permits, muſt it authoriſe them? Courts, not favouring negligence, will perhaps overlook an objection, which appears not on their record, when they would not overlook it in their record, when they were required to act on it, and make it a ground of their proceeding: for not to correct an irregularity, differs from ſupporting it. In an action of debt on a judgment of nonſuit, in an inferior court, it would ſeem to be neceſſary, to aver, in the declaration, that the nonſuit was given at a court held within its juriſdiction; and this is ſufficient, though the proceedings of the plaintiff below have been illegal from beginning to end. But it might have been doubted perhaps, whether this averment would have been ſufficient, if the plaintiff below proceeding illegally had obtained judgment, and brought an action of debt on it. Much may, in ſuch caſe depend on the queſtion, who urges the objection? Did he occaſion, or could he have reſiſted the irregu-

12 Co. 77, 78. 4 Burr. 2035-9. 2 T. Rep. 475, 649, &c.

4 Burr. 2035.

3 T. Rep. 348.

Murray v. Wilſon. 1 Wils. 316

larity in the inferior court, or was he affected by it there? In an action againſt an officer of an inferior court, for an eſcape, the court of King's Bench held, that, ſuppoſing the plaint below to be erroneous, the officer could juſtify the arreſt, and ſhall not, in this collateral action ſay, that the plaintiff could not have had the effect of his ſuit below; nor ſhall he, after verdict, when every thing neceſſary is preſumed proved at the trial, object, that the declaration alledges not, in what manner the defendant below was indebted, nor ſhews, that it was a debt of which the inferior court had juriſdiction. 1793. *Bull v. Steward*, 1 *Wils.* 355 2 *Wils.* 5.

In what ſituation then were *Lacaze* and *Mallet*, in the court of Admiralty. They were neither plaintiffs nor defendants, they were neither the perſons libelling, nor the perſons libelled againſt. They were not the owners of the money, nor could they have been conſidered as the agents of the owner authoriſed to receive it. For if they had either been the owners or authoriſed agents, ſuch a ſtipulation would not have been neceſſary. It was not neceſſary from an owner, for he has a right to his money, without giving caution. It was not neceſſary from an authoriſed agent; for caution was a matter that lay only between the agents and the owner, and no other than the owner had a right to require caution, which he did not chooſe to require, and thus bring ſureties into danger.

But whatever they were, it will be ſaid, ſhall they, truſted at their own requeſt, diſpute the authority under which they acted, when they are called to an account for miſconduct, and the perſon injured joins in the demand? And after the proceedings in the Admiralty, and defence and verdict at common law, ſhall enquiry be made, as to the Admiralty juriſdiction? Who ſhall diſpute the juriſdiction of the Admiralty over this money? The owner. Were *Lacaze* and *Mallet* the agents of the owner? They might then, inſtead of allowing the juriſdiction, in his name, have applied for a prohibition. They cannot, after ſtating themſelves to be, now deny that they were, the agents of the owner? If they admitted the juriſdiction to give this money, and take this ſtipulation, to permit them to deny it, when they are called to account, and the perſon injured applies to

1793. the ſtipulation for a remedy, would, it may be ſaid, ſhock the plaineſt principles of honeſty, and break the bands of mutual confidence.

There is weight in this reaſoning, and ſurely the abſurdity would be ſhocking, if no remedy exiſted on this ſtipulation. But the preſent queſtion is, not whether any remedy exiſts on the ſtipulation, but whether the ſtipulation is now to be conſidered as regularly and judicially taken, on a ſubject within the juriſdiction of the court of Admiralty. If there were in the information an averment of juriſdiction, it might be improper, at this ſtage of the buſineſs, to ſuffer it to be denied. Even though there be no averment, it may be contended, that this would be improper, unleſs want of juriſdiction appear on the face of the proceedings. If this appear, it is never too late to object to it. My doubt is, that a want of juriſdiction does ſo appear.

I have already acquieſced in the juriſdiction of the Admiralty, in taking this money into its poſſeſſion, for ſafe cuſtody, and for examination and deciſion of all claims to it. So far I admit the acts of this court were judicial. But I doubt whether the duty of the court extended beyond the preſervation of the money, and the dilivery of it to the owner or his agent. I think it extended not to the tranſmiſſion of it to the owner's place of abode, or into the owner's hands, unleſs he came to that court, or its officer, to receive it. This ſtipulation was taken, that *Lacaze* and *Mallet* ſhould remit the money to *Lanoix*, and indemnify the judge and officers againſt his, and every other claim. It was the duty of *Lanoix* to come to the judge of Admiralty, for the money; it was not the duty of the judge of Admiralty to remit it to him. If *Lacaze* and *Mallet* were the authoriſed agents of the owner of the money, it was not the duty of the judge to take ſecurity for the performance of their agency. If they were neither agents nor owners, it was not the duty of the judge to deliver the money to them. Can a judge be conſidered as acting judicially, when he is doing what it is not his duty to do? Can a judge need an indemnification for doing a judicial act? Or can the ſtipulation taken in an act not judicial be a judicial act? I doubt whether this be a judicial act. But it is a reaſonable and fair way of

ſerving the owner, by the earlieſt and eaſieſt method of tranſmitting his money to him. And the only light in which I can conſider *Lacaze* and *Mallet*, in this tranſaction, is as the voluntary agents of the judge of the Admiralty, intruſted by him, at their requeſt with the cuſtody and tranſmiſſion of this money. For the performance of this truſt, and for indemnifying himſelf, he takes this ſtipulation. Is he not then acting at his own riſk, as a man, not regularly as a judge? And would not a better way have been, to have taken a bond? 1793.

There being yet grounds of doubt, I proceed to the third queſtion.

3. Is this ſtipulation, independent of all judicial circumſtances, ſuch a contract, as will maintain an action of debt againſt *Lacaze*, *Mallet*, and *Roſs*?

In conſidering whether this ſtipulation, ſtript of all judicial ſolemnity, and taken only as a contract *en pais*, be ſufficient to maintain an action of debt againſt *Lacaze*, *Mallet*, and *Roſs*, I lay aſide all conſideration of the manner, in which the court of Admiralty got poſſeſſion of the money. Holding it a matter of indifference, whether the judge and officer of that court acted by authority, or as treſpaſſers. I conſider it as undiſputed, that they might make ſuch a contract, and I proceed to examine its legal operation on the plaintiffs in error.

Pennſylvania, whether by wright or wrong, it is immaterial, being in poſſeſſion of this coin, gave it up to *Lacaze* and *Mallet*, to deliver to *Lanoix*; and *Lacaze*, *Mallet*, and *Roſs*, bound themſelves to *Pennſylvania*, in the penalty of 4000*l.* ſterling, that *Lacaze* and *Mallet* would deliver it to *Lanoix*. If *Lacaze* and *Mallet* had been the agents of *Lanoix*, *Roſs* might have had the advantage of this, at the trial; and, after this verdict, I will take it, that they were not, and that this was not an engagement, that a man entered into, as a neceſſary mean of obtaining his own money; but an engagement entered into, whereby he obtained the money of another man, for the purpoſe of delivering it to him. It was a bailment, a fair contract, and the bailee, though acting *gratis*, is liable, on the implied undertaking, for groſs negligence, and on an expreſs undertaking, for the due execution. For he undertakes and is truſted, on thoſe

2 *Str.* 915.

Bracton B. 3, 100. *Wheatly v. Lane*, Cro. *J.* 607. *Coggs v. Barnard*, *Ld. Ray* 909, 920.

1793. terms. This confidence of the bailor is a sufficient consideration for the undertaking of the bailee, and thus a contract is formed, which, without any valuable consideration, request, or writing, binds the bailee.

1 *Powel Contr.* 364-5.

1 *Powel Contr.* 331, 343. 2 *Comm.* 445—6. 3 *Burr.* 1663. By the law of nature and nations, and, therefore, by the law merchant, which is founded on that law, a fair and deliberate contract is, of itself, and without any consideration to induce it, a good ground of action. But, by the civil law, if some consideration, other than the contract itself, do not exist, this bare contract, unless ratified by certain solemnities, bound not the party making it. The law of *England*, borrowing this principle, seems to have adopted it in its full latitude, and, holding a consideration necessary, never presumes one, unless the contract be confirmed by the deliberate solemnity of writing, sealing, and delivery.

2 *Comm.* 445-6. 3 *Bac. Abr.* 146. *Cowp.* 290-4. A consideration is sufficient to support a promise, if it be either a benefit to the party promising, or a loss to him, to whom the promise is made, or if the party promising be under a legal, equitable, or moral obligation, to do what he promises: or if he, to whom the promise is made, trusting to it, foregoes an advantage, or suffers a consequential loss; as if one, without any consideration, promise to keep my goods safely; or a carpenter promise to repair my house; though they do not, no action will lie on this promise, until I suffer some loss, through their default; but if, trusting to such promise, I deliver my goods to this bailee, and he spoil them, or lose them; or, waiting for the carpenter to repair my house, according to his promise, which he neglects to do, I suffer damage; or if he does it unskilfully; for my loss, through the non-performance or misperformance of these undertakings, I may support an action.

1 *Powel Contr.* 331-44. *Ld. Ray* 909-19.

Wheatly v. Low, *Cro. J.* 668. 1 *Powel Contr.* 365-6. Plaintiff, being indebted to *A.* delivered a sum of money to defendant, to pay over to *A.* Defendant paid it not. *A.* sued plaintiff, who thereupon sued defendant, for a breach of his trust and promise, and had a verdict. Defendant moved in arrest of judgment, because there was no consideration. This objection was over-ruled, and the judgment given was affirmed on error. Before the intermarriage of the plaintiffs, the father of the husband had promised to the wife, that, if the marriage took effect, he would assure them certain land. Defendant,

Brown & ux v. Garborough *Cro. El.* 63.

his couſin, ſtanding by, promiſed her, if the father did not, that he would give her 100*l.* The marriage took effect, and the promiſe of 100*l.* was held good; not only becauſe they were of kin, but becauſe the woman truſted defendant, rather than the father of her huſband.— The laſt is, of itſelf a ſufficient, and, I think, the true reaſon. There was an agreement between plaintiff and *A.* that plaintiff ſhould have a leaſe of *A.* with divers covenants. At the day of ſealing, plaintiff refuſed, on account of the inſertion of a new covenant, concerning repairs. Defendant, ſtanding by, took on himſelf to make the repairs, if plaintiff would ſeal the leaſe. He did ſo, and, in *aſſumſit*, this was held a good conſideration, though the ſealing of the deed was of no conſequence to the defendant. 1793.

v. Storer Dyer, 72 b. pl. 32. in not. See 1 Powel Contr. 345. Cro. J. 342. Hob. 4. 5.

Mutual promiſes are conſiderations for each other; and a conſideration very trifling will ſupport a promiſe; as "if you ſhew me a deed, whereby it appears, rent is due, I will pay you;" or "if you will come ſuch a day, I will pay you:" in theſe caſes, the ſhewing of the deed, or the going to the houſe, is a ſufficient conſideration. But no conſideration that is executed, and intirely paſt, from which no legal, equitable, or moral duty remains, will ſupport a promiſe: for the promiſe being ſubſequent could not have been the inducement, which cauſed the conſideration, and is therefore altogether voluntary and gratuitous. In applying this rule, we muſt diſtinguiſh thoſe caſes, where the conſideration is not intirely paſt, but conſiſting of ſeveral parts making, in the whole, one tranſaction, of which though ſome part of it be paſt, ſome part yet remains to be executed. As where one agreed to demiſe a ſhop to another, paying 40*s.* by the year; and for the perfecting thereof each gave the other one ſhilling. Afterwards, in conſideration of the premiſes, leſſee promiſed to give leſſor 30*l.*; in conſideration whereof, and in performance of the contract, leſſor made a leaſe to leſſee. It was held that the promiſe of 30*l.* was good. For the leaſe was after the promiſe. The agreement is in performance of all, not of part. It was leſſor's part to make the leaſe to the defendant, and his part to pay the rent and 30*l.* in conſideration of his quiet enjoying. So, in *aſſumſit*, plaintiff declares, that, in conſideration that he had, on 10th *December*, bought land of defendant, afterwards, on 19th *December*, defend-

1 Powel Contr. 343. Stucy v. Allany, Cro. El. 6, 150. Gilbert v. Ruddlehead Dyer 2 2. b. pl. 32. in not. 1 Powel Contr. 348. 52. Hunt v. Bate Dy. 272. b. pl. 31. Barker v. Halifax Cro. El. 241. 1 Com. Dig. 142.

2 Ruſſ. 73. 1 Powel Contr. 349.

Hartop v. Hoare, Cro. El. 138. See alſo Cro. El. 42. 94. 138.

1793.

ant promiſed to make him a ſufficient aſſurance thereof, by ſuch a day. After verdict, it was urged, that the conſideration was paſt. But it was adjudged for the plaintiff; for the aſſurance was the ſubſtance of the ſale and the tranſaction.

Dy. 272, *b.* 31. 3 *Bulſtr.* 187. 1 *Rolle Rep.* 381. *Rolle abr.* 12. *pl.* 10. 1 *Powel Contr.* 372. *Dyer* 272. *b* 32. *Boſden v. Thinn. Cro. J.* 18. *Sidenham v. Worthington, Cro. El.* 42. *Cro. Car.* 402. *Salk.* 96. *Cowp.* 294. *Cro. El.* 42. *Dyer* 272. *b.* 32 *in not.* 1 *Powel Contr.* 352.

And, though the conſideration be intirely paſt, if it was done, at the requeſt of the party promiſing, the law, giving the promiſe a relation back to the requeſt, holds it ſufficient. If *A.* requeſt me to give my credit to *B.* for 50*l.* I give my bond, am ſued, and have to pay 70*l.* and I ſhew this to *A.* who promiſes to pay me 70*l.* this promiſe is good. So, though the conſideration be paſt, if there be a ſubſiſting duty, at the time of the promiſe, it will bind; as a promiſe to pay a ſervant wages, for paſt ſervice, or to pay a debt barred by the ſtatute of limitations, or contracted during infancy. So *aſſumſit* lies for the burial expences of the wife or child of another, without requeſt.

On the principles which have governed theſe deciſions, no doubt can remain, that the promiſe, made by theſe parties, to the ſtate of *Pennſylvania*, acting by its agent, the judge of Admiralty, is ſufficient to ſupport an action. Here is an undertaking and a breach of truſt, which, without any conſideration, is ſufficient. Or, ſuppoſing a conſideration neceſſary, and the order of the Admiralty to be the conſideration, it was not altogether paſt; it was but part of a tranſaction, the moſt material part of which, and the principal object in the view of all the parties, the delivery of the money, like the execution of the leaſe, and quiet enjoyment under it, in one of the caſes cited, or the execution of the conveyance, in another of the caſes, remained to be executed by *Pennſylvania*, after the promiſe was made, and was a conſequence of the promiſe; though the order of the court in this caſe, and the agreement for the leaſe, and for the purchaſe in the other caſes, be ſtated as the conſideration, and be previous to the promiſe. But ſuppoſing the conſideration paſt, it was preceded by a requeſt of the party promiſing. The order was made, on the petition of *Lacaze* and *Mallet*. And the whole tranſaction may be conſidered as mutual promiſes; on the part of the court, to give the money; and on the part of *Lacaze*, *Mallet*, and *Roſs*, that *Lacaze* and *Mal-*

2 *Bulſtr.* 73. *Cro. El.* 138.

let ſhall remit it to *Lanoix*. And, in almoſt every view that you can take of it, the promiſe is ſufficient. 1793.

But every promiſe, that is good in law, will not ſupport every action: and there are promiſes, which, though they will ſupport an action, will not ſupport an action of debt.

Had all the plaintiffs in error been bailees, there would have been leſs difficulty in declaring the operation of ſuch a contract, as this. But the difficulty ariſes from *Roſs*, to whom the money was not delivered, being involved in the ſame contract with *Lacaze* and *Mallet*, to whom the money was delivered.

It is not a new thing, to conſider parties to the ſame contract, as equally bound, for one purpoſe, but ſeparate, for another. In an annuity contract, it was held, that the ſurety, though liable, on the expreſs contract, for the payment of the annuity, was not liable, on the implied contract, on the annuity becoming void, to return the conſideration money, which he had never received: but the principal was held liable, on this implied contract. I cite this caſe, not as parallel to the preſent caſe, for this is an expreſs promiſe by all, but as ſhewing, that parties, equally bound for one purpoſe, *may* not be equally bound for every purpoſe of the ſame tranſaction. And here, it may be contended, that *Roſs*, though liable on the ſpecial undertaking, to remit the money, is not liable in debt, for what he never received.

Raſtall v. Lowrne. 2 *T. Rep.* 366. 1 *Powel Contr.* 209-31. *Shove v. Webb*, 1 *T. Rep.* 732.

Indebitatus aſſumſit was brought on a bill of exchange accepted. There was a verdict for plaintiff, and a motion in arreſt of judgment, becauſe, though caſe lies on a bill of exchange accepted, on the cuſtom of merchants (which requires no conſideration) yet *indebitatus aſſumſit* (which lies only where debt lies) cannot be brought thereon. It was held, that a bill of exchange accepted, though a good ground of a ſpecial action on the caſe, on the cuſtom of merchants, does not make a debt, becauſe the acceptance is conditional on both ſides, if the money be not received, it returns on the drawer, who remains liable ſtill, and this is but collateral; and becauſe the word *onerabilis* does not imply debt; and becauſe it is but evidence of a promiſe to pay, which is *nudum pactum*: but debt lies on it againſt the drawer himſelf, for he is really a debtor by the receipt of the money. Debt, or

1 *Salk.* 23. 1 *L. Ray* 69. 2 *Burr.* 1099. *Hardr.* 485.

Brown v. London. 1 *Mod.* 285.

1 *Salk.* 23. 12 *L.* 2 *L. Ray* 1035. 2 *Com. Dig.* 64.

1 *Ventr.* 198

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2 *Com. Dig.* 64, 1 *Sale*, 23, 125. 3 *Salk.* 14 175 *L. Ray* 69 1 34. 1 *Salk.* 23 *L. Ray*, 84, 682 224. 1 *Lyp.* 1 3. *Dyer* 230, *pl.* 56 *Sands v Trevilion*, *Cro Car*, 107 193. 2 *Com. Dig.* 630, 1 *Roll* 594, 35 *Dyer* 272. *Hardr.* 488. *Shandow v. Simson*, *Cro. El.* 880.

indebitatus assumsit, lies not for interest of money due on a loan; for money won at play, or on a wager; nor on mutual promises; for there must be a consideration, a *quid pro quo*, to support debt, or *indebitatus assumsit*:— but *assumsit* lies in these cases. A declaration in *indebitatus assumsit*, against a father, for money *lent* to his son, at the request of the father, is bad; for *lent* is a technical word, and creates a debt in the son, to whom it is lent, and cannot be lent to two; but it would have been good, if *delivered* to the son, at the request of the father: for then the *loan* had been to the father: but being now to the son, the father is only collaterally bound, and liable in a special *assumsit*. So, though for goods sold, or service done, to another, at the request of a third person, debt lies not against him who requested; for the contract is by the *sale*, and the *service done*, yet being to another, there is no *quid pro quo*, and request, without more makes not a debtor; yet on a contract, to retain one, to embroider the gown of a third person, he has election to have debt or *assumsit*. If one undertake, that if *A.* release his debt to *B.* he himself will be his debtor, debt lies not. *B.* retains *R.* to be miller to his aunt, at 10*s.* per week; debt lies not on this, but an action on the case: for, in debt it is requisite, that the benefit come to the party who promises; and so, for the want of a *quid pro quo*, debt does not lie: but this will support an action on the case; for though it be not beneficial to *B.* it is chargeable to *R.* Debt lies not on a collateral engagement, as for goods delivered by *A.* to *B.* at the request of *C.* which *C.* promised to pay, if *B.* did not; for in that case, a debt or duty does not arise between *A.* and *C.* but a collateral obligation only.

2 *Com. Dig.* 63 9 *H.* 5, 14. *Baxter v. Read. Dyer*, 272, *in not.*

Hardr. 486.

Though changing the form of the action, change neither the justice of the demand, nor perhaps the amount of the recovery, these cases manifest a distinction between parties liable on the same contract, and in the forms, by which the same sum may be recovered. Perhaps the same distinction may be hinted in the following case.— Testator promised to pay the plaintiff 50*l.* if he would forbear to prosecute an attachment of privilege against him. On this promise, plaintiff brought *an action on the case*, against defendant, executor of the promiser. It was held, that the consideration was good, and that *debt* would

Hob. 216. 1 *Powel Contr.* 344.

have lien againſt the teſtator, for 50*l.* being a ſum due on a contract, in which he received *quid pro quo*: for, forbearing the ſuit was as beneficial in ſaving, as other things in gaining. 1793.

If from theſe caſes, it ſhould be collected, that the ground of an action of debt is the conſideration or equivalent given by the *debtee*, to the *debtor*, without which, either proved or preſumed, no debt can be raiſed; and that damage, ariſing from the breach of a promiſe, is a ground only for a ſpecial *aſſumſit*; it may be contended, that, though debt lies againſt *Lacaze* and *Mallet*, who actually received the money, it lies not againſt *Roſs*, who received none of it, and is not bound by a ſpecialty, for its remiſſion or repayment. Though the receipt of the money created a debt or duty, in *Lacaze* and *Mallet*; the promiſe of *Roſs*, without ſuch receipt, created none in him; and raiſed only a covenant or *aſſumſit*, for the breach of which, damages will be recovered.

But, it may alſo be contended, this action is not brought for the money intruſted to *Lacaze* and *Mallet*, but for a fixed penalty expreſſly ſubmitted to by *Lacaze*, *Mallet*, and *Roſs*, and acknowledged due by them to *Pennſylvania*, if *Lacaze* and *Mallet* did not perform their truſt; and, though it never was the duty of *Roſs*, to tranſmit the money delivered to *Lacaze* and *Mallet*, it became his duty, as well as theirs, to pay the penalty, when they had failed to tranſmit the money delivered to them.

Actions for penalties are not favoured; and the diſtinction between a contract for a real debt, and for a penalty, is not new in the law, even when the penalty is ſtipulated for, by the ſolemnity of a deed. A promiſe or ſingle bill, by an infant, for a debt due for neceſſaries, is good; but a bond with a penalty, for ſuch debt, is void. A contract, upon good conſideration, to reſtrain from trading in a particular place, is good ground of *aſſumſit*; but a bond or covenant, to pay a ſum certain was held void, becauſe it left not the matter open to a jury, to make the damages commenſurate to the conſideration and injury; but, whatever might be the conſideration or injury, made the whole penalty recoverable, in an action of debt. A later deciſion has, indeed, overruled this diſtinction.

1. Becauſe the penalty is favourable to the obligor, as fixing the ſum, for which, he may repurchaſe his trade.

1 *P. Wms.* 194 *Ayliff v. Archdale.* *Cro. El.* 920. *Clerk v. Gov. & Co. of Taylors, in Exchequer on error,—and judgment of B. R. reverſed,* 3 *Lev.* 241. *March* 77. 193. *Moore* 81. 259. 279. 2 *Leon* 210. *Ney.* 98. 1 *Powel Contr.* 169. *Mitche v. Reynolds.* 1 *P. Wms.* 181, 197.

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2. Becauſe it is his own act.

3. Becauſe he can ſuffer only by his own knavery; and courts are not to protect that from paying too much.

4. Becauſe reſtraints by cuſtom of particular places may be enforced by penalties; and

5. Becauſe, whether the contract be good or not, on conſideration of the circumſtances, is matter of law, not fit for a jury. It is true, ſince the equitable powers of courts have permitted no more than the real debt or damages to be recovered, the action of debt ſeems to have but the ſame effect as covenant; and the reaſon given, for the diſtinction above mentioned, loſes its force. But it is alſo true, that the *firſt* reaſon, for over-ruling the diſtinction, is not applicable to the preſent caſe; for it can never be favourable to the obligor, to pay double the ſum due. So alſo the *third* reaſon applies not to *Roſs*. And the *fourth* and *fifth* reaſons have no operation on this caſe. To over-rule the diſtinction in this caſe, there remains only the *ſecond* reaſon. But this reaſon, whatever weight it may deſerve, in ſupport of a deed, muſt have leſs, when applied to a parole contract. For ſince words are frequently ſpoken inadviſedly, and without due deliberation, the ſame law, which requires a conſideration to ſupport ſuch a contract, would perhaps heſitate, on a tranſaction of ſo little ſolemnity, to declare a penalty incurred.

Vinn. Juſt. Inſt. 554. 1 *Powel. Contr.* 330.

Preſton v. Tooley, Cro. El. 74.

A ſpecial *aſſumſit* ſeems to have been brought, on a caſe like the preſent. *A.* promiſed to *B.* that, if he would deliver to him a ſtatute ſtaple, which he had on *C.* for 1000*l.* to look at, he would keep it ſafely, and deliver it to *B.* or pay him 1000*l.* As, on the writ of enquiry, only 200*l.* damages were found, it ſeems reaſonable to preſume, that the 1000*l.* in the ſtatute ſtaple was a penalty, and the 1000*l.* in the promiſe, was therefore a penalty alſo; and, though a preciſe ſum was promiſed, and the action was againſt a principal only, *aſſumſit*, and not debt, was brought, on this promiſe. In the caſe before us, if *aſſumſit* had been brought, I have no doubt, it would have lien: and, for the reaſons which I have ſtated, I am inclined to think *aſſumſit* the moſt proper form of action, on this engagement.

Lady Shandois v. Simſon Cro. El. 880.

But, notwithſtanding this opinion, and thoſe reaſons, which have given me very ſerious doubts, on this ſub-

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ject; as the boundary between *debt* and *aſſumſit*, in ſome of thoſe caſes, appears to be nice, if not to ſhift from ſide to ſide; as, in the caſes of retaining one to do a ſervice to another, it is ſometimes held, that debt lies, ſometimes, that it lies not, but *aſſumſit* only, and debt againſt the perſon, for whoſe uſe, the ſervice is, and ſometimes, that the perſon retained has his election of debt or *aſſumſit* againſt the perſon retaining; as here is an expreſs engagement, by all the plaintiffs in error, on a certain default, to pay a certain ſum of money; as this is a promiſe, on a good conſideration, and as a promiſe, on a good conſideration, binds, without deed, and the uſe of a ſpecialty is, that a conſideration is implied; and, as the only effect of giving way to my doubts would be, to change the form of the action, delay juſtice, and add to the loſs and vexation of the injured party; I will not, at this ſtate of the proceeding, ſay, that this action ſhall not be maintained. As it is undecided, that no action lies on a ſtipulation, and doubtful whether this be a judicial proceeding; yet, being a fair, deliberate, and ſolemn contract, the ſtrong principles of juſtice require, that a remedy ſhould be adminiſtered; and this *may* be a proper remedy.

2 *Roll.* 77. 1 *Com. Dig.* 638. *Cro Car.* 18., 193. *Dyer* 256, *b.* 56 *Bradford* v. *Woodhouſe* *Cro. J.* 520. *H. Bla.* 241.

But, ſuppoſing a proper form of action to have been choſen, unleſs it have alſo been properly proſecuted, the proceeding will be erroneous. The *fourth* queſtion, therefore, remains to be conſidered.

4. Is a breach of this ſtipulation ſufficiently ſet forth in the declaration?

I am of opinion, that, after defence, verdict, and judgment, we ought to preſume, that *Lanoix* was owner of this money, and, of courſe, that a breach is ſufficiently ſet forth, to ſupport this record. It appears in the information, that *Lacaze* and *Mallet* themſelves ſtated this in their petition; ſhall they now deny it? Unleſs *Lanoix* had been the owner of the money, would they not have controverted it? And is it not eſtabliſhed by the verdict for his uſe? If he had not been the owner of the money, the defendants would have ſo pleaded or ſhewn it, in diſcharge of themſelves from the preſent action. It is averred, in the words of the ſtipulation, that *Lacaze* and *Mallet* did not perform the truſt repoſed in them.

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I am, therefore, of opinion, that the judgment given in the Supreme court be affirmed; and I am pleaſed to find no ſufficient reaſon, to obſtruct its effect, and longer delay the payment of a juſt debt.

Judgment affirmed.

ABRAHAM STONE, plaintiff in error, *v.* MICHAEL FURRY.

THIS caſe was argued, at *July* term, 1793, by *Serjeant* and *Todd*, for the plaintiff, and by *Ingerſoll* and *Tilghman*, for the defendant in error.

The opinion of the court, delivered by the preſident, on the 17th of July, 1793, comprehended a ſtate of the caſe and affirmed the judgment.

CHEW, PRESIDENT. An action on the caſe, brought in the court of Common Pleas of *Berks* county, by *Michael Furry* againſt *Abraham Stone*, was removed by *habeas corpus*, into the Supreme court, of *April* term, 1784. The declaration had three counts.

1. The firſt count was ſpecial, and ſtated, That, whereas *Furry* and one *Minich*, on 21ſt *February*, 1775, had purchaſed a plantation from one *Swan*, and, in part payment, had given ten bonds, each in the penalty of 100*l.* and, for the payment of 50*l.* in ſucceſſive years, at and from 1ſt *May*, 1780; and whereas, on 10th *February*, 1777, in conſideration that *Michael Furry*, at the requeſt of *Abraham Stone*, had ſold the ſaid plantation to *Abraham Stone*, and taken, in part payment, ten bonds on *Abraham Stone*, and *Peter Stone*, in the ſame penalties, and conditioned for the ſame payments, at the ſame times, as ſpecified in the bonds of *Furry* and *Minich* to

Swan, the ſaid *Abraham Stone* had aſſumed to the ſaid *Michael Furry*, that he would pay the bonds of *Furry* and *Minich* to *Swan*, and deliver them up to *Furry* at his houſe in *Tulpohaken*; and whereas, on 10th *February*, 1780, the money being unpaid, *Abraham Stone*, in conſideration, that *Furry* would receive of him the ſum of 500*l.* in continental bills of credit, then current, in diſcharge of his and *Peter Stone's* bonds, promiſed to pay to *Furry* all ſuch damages and loſs, as he ſhould ſuſtain, by accepting the continental bills, in lieu of delivering up to *Furry* the bonds given by *Furry* and *Minich* to *Swan*; thereupon, *Furry*, truſting to this promiſe made by *Abraham Stone*, afterwards, on the ſame day, received the continental bills in diſcharge of the obligations of *Abraham Stone* and *Peter Stone*, and in lieu of the obligations of *Furry* and *Minich*, which *Abraham Stone* had agreed to deliver up to *Furry*; and that afterwards, on the ſame day, *Furry* thereby ſuſtained damage 400*l.* whereof *Abraham Stone* had notice. 1793.

2. The ſecond count is on a general *indebitatus aſſumſit*, for 400*l.* had and received by *Abraham Stone*, for the uſe of *Michael Furry*.

3. The third count is on a general *indebitatus aſſumſit*, for 400*l.* laid out and expended, by *Abraham Stone*, for the uſe of *Michael Furry*.

General damages are laid 500*l.*

This caſe was tried at *Niſi Prius*, 31ſt *May*, 1792, when a verdict was given for the plaintiff for 678*l.* 13*s.* 2*d.* damages, and 6*d.* coſts. Judgment *niſi* was entered on this verdict, on the 1ſt day of *September* term, 1792.—And, in the ſame term, on 14th *September*, 1792, a writ of error, regularly taken, according to law, out of this court, was preſented to the Supreme court, in behalf of the defendant in the Supreme court. Afterwards, on motion in behalf of *Furry*, the plaintiff in the Supreme court, there was a rule made by the Supreme court, that the defendant in that court, who is the plaintiff here, ſhould ſhew cauſe, why 178*l.* 13*s.* 2*d.* part of the verdict, being the damages found exceeding the ſum laid in the declaration, ſhould not be remitted, *Furry*, the plaintiff in the Supreme court, paying the coſts of the writ of error, and of the rule. On argument of counſel on both ſides, this rule was made abſolute on

1793. 15th *September*, 1792, in the same term, and judgment rendered for 500*l.* damages, and sixpence costs, with 32*l.* 1*s.* 11*d.* costs of increase.

Error has been assigned, that the jury had assessed damages 638*l.* 13*s.* 2*d.* when *Furry* had stated in his declaration, that he had suffered damages only to the amount of 500*l.* The general errors have been assigned, and, *in nullo est erratum* pleaded.

The counsel for the plaintiff in error have made the following objections.

Persival v. Spencer, Yelv. 45. 2 Buc. abr. 4, 5.

1. After final judgment, writ of error, and security to prosecute, the Supreme court could not amend its record, by entering a *remittitur* of the surplus damages, and giving judgment only for the sum laid in the declaration: though this might have been done before judgment, and writ of error.

Tender laws. Acts of Assembly from Jan 1771 to June 1780.

2. The acts of Assembly making paper-money a legal tender, render it illegal to bargain for a premium for accepting a payment in such currency. No action will lie on a promise founded on an illegal consideration.

1 Esp. 89, 92.

The law made paper-money equivalent to coin; and if coin had been paid nothing farther could have been demanded on these bonds. And supporting this action would open a door to a vast flood of law-suits, and countervail the tender laws.

5 Vin. 175-9. 6 Vin. 344-6. 2 Vin. 548-55 4 Bac. 14.

3. This promise is to pay money due on a specialty, and no action of *assumsit* lies on such promise; for it will not bar an action on the specialty itself.

1 Esp. 134. 5 Com. Dig. 43-4.

4. The declaration has four counts, for that, which appears as the first count, is, in fact two; and there are only three averments of breach. The breach of this promise is ill laid. Averring generally, that he has suffered damage is bad, without shewing how; for it might have been *damnum sine injuria*, arising by the default of *Furry* himself, and no fault in *Stone*. The promise was to make good the damage; and there is no averment, that this is not done, but only, that *Stone* had notice.—True, this is after verdict; but in an action on a bill of exchange, after verdict, judgment was arrested, because no sufficient cause of action was stated. If this count be bad, the verdict being general on all, no judgment can be given.

Doug. 654.

Doug. 703. 4 Buc. 9.

On these points we are of opinion:—

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1. As to the firſt objection, the amendment being made during the term in which judgment was entered, there can be no doubt, but the Supreme court had full authority to make it. We think the amendment made on good grounds, neceſſary for expediting juſtice, and not to be controverted. *French v. Cornely*, 1 *Bla.* 453. *Pickwood v. Wright*. *H. Bla.* 643. 2 *Bac.* 5.

2. The ſecond objection is ſufficiently anſwered, by obſerving, that none of the debt was due, when the paper money was tendered. *Furry* was not *then* bound to accept it, and might, therefore, lawfully annex a condition to his acceptance; and this condition might be a good conſideration for an *aſſumſit*, eſpecially as it was only the fulfilment of a former promiſe, in conſideration of which theſe bonds were accepted as payment. As to opening a door to law ſuits, few, if any, ſuch expreſs promiſes were made, or if made, they will now be barred by the ſtatute of limitations; or if honeſt and valid, like this, they ought to be performed. The bonds alone were not taken in payment of the plantation; but the bonds and a promiſe. Payment of the bonds in ſpecie, would not have diſcharged the promiſe alſo: relinquiſhment of performance of this was a good conſideration of another promiſe.

3. This is not an action for the money due on the bonds, but an action on the promiſe to indemnify *Furry*, for accepting the paper money, inſtead of performance of a former promiſe, to diſcharge and deliver up the bonds in the hands of *Swan*. The bonds and promiſe might have both been ſued on; and a ſuit on the one ought not to bar a ſuit on the other. If the one ſuit *ought* not to bar the other, the objection, that it *will* not, has no force.

4. No doubt, this declaration is very inartificial; and were a queſtion on the firſt count before us, in the way of demurrer, we ſhould have very little heſitation, to declare it bad, and give judgment for the defendant.—But a defendant, who, knowing that a declaration is bad, lies by, and pleads the general iſſue, takes his chance of a jury trial, and obtaining the advantage of the diſcloſure of the plaintiff's teſtimony, comes forward, on grounds foreign to the merits, and of which he before had and omitted an opportunity of availing

1793. himself, and desires another chance with a jury, is surely not to be favoured. The defendant might have demurred, or pleaded so as to bring out a good assignment of a breach, and averment of damage. Since he has not done this, we will make every possible construction, to sustain the verdict.

Collins versus Gibbs, 2 *Burr.* 899. In an action on the case on *assumsit*, the plaintiff's declaration did not aver performance of a condition precedent; and, therefore, after judgment by default, and writ of enquiry, defendant moved in arrest of judgment. Lord *Mansfield*, in delivering the resolution of the court, said, that a motion in arrest of judgment by default, came before the court exactly as if it had been on demurrer; and is not like the cases of objections to judgments after verdict. The want of averment cannot be made good in this case; and the true distinction, as to supplying such defects, is whether the objection be made after verdict or not.

We say, therefore, that in this declaration, there are but three counts. The first count states a promise, on a complex consideration, and damages arising to the plaintiff, from his confidence in this promise. How these damages arose, ought to have been stated specially; but it is not. Averment of a failure to indemnify ought to have been made; but it is not. But as a verdict, though it will not cure a defect of title appearing in the declaration, will cure a title defectively set out; as a promise, and damage arising out of it to the promisee, are here stated; this says, though imperfectly, a ground of action; and all necessary circumstances must have been proved at the trial.

2 *Wils.* 261. 3 *Wils.* 275. *Comyn.* 826. 1 *Wils* 1 7. 4 *Burr.* 2020 2 *Str.* 1011-2. 1 *T. Rep* 145. 1 *Mod.* 42,43

As we think, therefore, that the first count, against which only there are objections, is aided by the verdict; the last objection falls to the ground.

Here then is a voluntary promise made by a debtor, in consideration, that a creditor would accept a payment of a debt not then due, in a currency depreciating, in a rapid progression, and, very soon afterwards, entirely extinguished. The damage of the receiver is manifest; for, if the payments had been delayed (and *Furry* might have delayed them) till the times when they became due; no paper money could have been tendered, but to the first bond. This damage being stated and proved

to have arisen from a binding promise made and broken, and not compensated, a good ground of action is stated on the declaration, and proved at the trial. We, therefore, hold, that the declaration, imperfect as it is, is now aided by the verdict; and we affirm the judgment given by the Supreme court. 1793.

GEORGE FITZGERALD, for the use of MOOR and JOHNSTON, *v.* ANDREW CALDWELL, survivor of JAMES CALDWELL, his late co-partner.

A SUIT had been brought in the court of Common Pleas of *Philadelphia*, to *September* term, 1787, by *Fitzgerald*, for the use of *Moor* and *Johnston*, against *A. Caldwell*, and removed into the Supreme court of *September* term, 1787, on a note given to *Fitzgerald*, as agent of one *Vance*, for a debt due to *Vance*. The note was transferred to *Moor* and *Johnston*, for a debt due to them, by *Vance*. At the suit of other creditors of *Vance* foreign attachments were issued against him, and the debt, for which the note had been given, was attached by them in the hands of *Caldwell*; who pleaded this to the suit on the note which was then referred to referees, to report what sum was due by *Caldwell* to *Vance*, and what to *Fitzgerald*; subject to the opinion of the court on a case to be stated, or, if no case should be agreed on, to the determination of the court and a jury, so far as respected the attachments pleaded. The referees reported 3778*l.* 11*s.* 1*d.* due to *Vance*; or 5705*l.* 12*s.* 3*d.*, due to *Fitzgerald*. There was judgment on this report: but both were set aside, by agreement, and the matter referred back to the same persons; who then reported 4016*l.* 9*s.* 4*d.* due to *Vance*, or 5009*l.* 5*s.* 1*d.* to *Fitzgerald*. On this report, judgment *nisi* was entered, for 5009*l.* 5*s.* 1*d.*: and, on 2d *January*, 1792, "it was agreed by the parties, that the judgment rendered, for the sum found by the referees, be absolute; but shall await the trial of the attachments, and, if any thing

1793. should be recovered thereon, againſt *Caldwell*, the ſame ſhall be defalked out of the ſaid ſum, for which judgment was rendered, as aforeſaid, and execution ſhall iſſue for the reſidue only." One of the attachments having been tried, and the jury having found (as the debt had been previouſly aſſigned) that *Caldwell* had no property of *Vance's* in his hand; there was judgment on that verdict. Whereupon, on motion, that, the money having been tied up in *Caldwell's* hand, by attachment, no intereſt ſhould be charged on it; the Supreme court ordered, that *Caldwell* be diſcharged from the ſaid judgment, on the payment of 4016*l.* 9*s.* 4*d.* viz. the principal ſum found due to *Vance* by the ſaid report of the referees. To reverſe this order, and have the effect of the judgment for 5009*l.* 5*s.* 1*d.* a writ of error was brought in behalf of the plaintiff, to remove the record into the high court of Errors and Appeals. Here it was argued, in *July* term, 1793, by *Tilghman*, *Wilcocks*, and *Lewis*, for the plaintiff; and by *Sergeant*, *M'Kean*, and *Ingerſoll*, for the defendant.

On 18th *July*, 1793, the preſident delivered the opinion of the high court of Errors and Appeals, reverſing the order of the Supreme court, for leſſening the judgment; and affirming the judgment for 5009*l.* 5*s.* 1*d.*

The following are ſhort notes, which I took of his argument.—

The firſt agreement of reference is a leading feature in the cauſe, accurately expreſſed; well underſtood by parties, counſel, and court; approved by the court, and put on the record; binding all, and to be enforced not infringed by the court.

All this was done, ſo far, by court, referees, and parties.

But a caſe remained to be ſtated and argued, and decided by the court, or to be tried and determined by the court and jury. It is the province of a jury, to ſettle facts; of a court, to declare the law. The verdict, on the *ſcire facias* in the attachment, found nothing in the hands of the defendant. Of courſe, at the time of the motion, and the order of court, no defalcation was to be made, under the ſecond agreement. The judgment was for the ſum due to *Fitzgerald*. The court order defendant to be diſcharged, on payment of the principal ſum, or that found due to *Vance*.

The firſt agreement gave no ſuch authority for this order. For no caſe had been ſtated, and no trial by jury had been had. The exceptions to the firſt report were not, that intereſt ſhould not be paid on money attached, nor that the agreement was miſunderſtood, nor that judgment was entered *niſi*, on the wrong ſum. The queſtion of intereſt on money attached was not ſubmitted to the referees, and could be no part of their report, nor, of courſe, of the judgment on the report. 1793.

Neither the firſt nor the ſecond agreement, nor any thing appearing on the record warrant the judges of the Supreme court, to leſſen the judgment entered:—And the conſent of the parties to enter it reſtrained them. Yet, without any reaſon appearing, they have changed the judgment entered by conſent, and made a new one, at another term, than that in which it was entered.

If courts can do this, trials by jury or reference, and judgment by confeſſion, will be a nullity, when without any reaſon appearing, a court will diſcharge a defendant for a leſs ſum. If they may diſcharge for a leſs, they may refuſe to diſcharge but for a greater. This order is to be taken in the nature of a judgment, being deciſive on the rights of the parties: and to ſay, that, becauſe it is not in the form or expreſſion of a judgment, when it has all the effect of one, therefore, it is not a judgment, and no writ of error lies on it, would leave courts at liberty to do that informally and covertly, which they could not do openly and regularly.

We mean not to ſay, that a court cannot, in any caſe, after judgment, prevent a party from recovering more under it, than the judgment gave him. We have nothing to do with the queſtion of intereſt on attached money. We look only to the record; and it, from the deliberate conſent of the defendant, bound up the court from doing what has been done.

The judgment, therefore, of this court is, that the laſt decretal order of the Supreme court be reverſed; the judgment given for 5009*l.* 5*s.* 1*d.* and coſts be affirmed; and the record be remitted into the Supreme court, that juſtice be done thereon.

ALLEGHENY

ALLEGHENY COUNTY,

September Term, 1793.

JEREMIAH BARKER, *v.* WILLIAM SUTHERLAND.

1793.

THE declaration ſtated, That whereas, one *Jacob Whitſel* requeſted the plaintiff to ſell him a quantity of goods of the value of 75*l.* in conſideration of which, *Whitſel* would deliver to the plaintiff a power of attorney from him and *Lewis Whitſel*, to receive their pay, as ſoldiers of the United States; that plaintiff refuſed, and that thereupon defendant aſſumed, that 75*l.* was due to *Jacob* and *Lewis Whitſel*, and that he would be anſwerable; in conſideration of which, and, at the requeſt of defendant, that plaintiff delivered to the ſaid *Jacob* goods to the value of 75*l.*; that only 37*l.* 10*s.* of the ſaid pay was due; and that action accrued to plaintiff to demand of the defendant 37*l.* 10*s.* which he, though requeſted, had refuſed to pay.

The following receipt of *Jacob Whitſel* was proved, and read to the jury:—

"Received *July* 28th, 1791, of *Jeremiah Barker*, "the ſum of 75*l.* in full for my own and *Lewis Whit-* "*ſel's* diſcharges or arrearages of pay and cloathing, "due from the United States. Witneſs my hand,

"*Jacob Whitſel.*"

There was alſo evidence of the purchaſe of the goods, and of *Sutherland's* aſſurance, that ſo much was due, and that *Jacob Whitſel* would not ſell what he had not authority to ſell. And proof was given that 37*l.* 10*s.* was received, but that payment of any thing on account of *Lewis Whitſel* had been refuſed at the War office.

Jacob Whitſel (admitted by conſent) proved that he had called on the defendant only to judge of the value of the goods, that he heard no ſuch aſſurance given, and that he requeſted none.

Woods, for defendant. Here was no expreſs engagement on the part of *Sutherland*, but merely his opinion

1793. and belief, that *Whitſel* was, as he really is, an honeſt man. If there were, or even if the action were againſt *Whitſel*, there is no evidence, that the account at the war-office is finally cloſed, or that more money has not been received. Engagements of this kind muſt be ſpecial, and, in *England*, muſt be in writing.

Brackenridge, for the plaintiff. The *Engliſh* ſtatute of frauds extends not here. We have a ſtatute of our own, and this caſe is not within it. We have given ſufficient evidence, that we have not received at the war office, the amount which we paid to *Whitſel*, and which *Sutherland* was to have made good; and we have been refuſed any more. This is enough for us. If more has been received, let the defendant ſhew it.

PRESIDENT. Were this a caſe within the ſtatute of frauds in *England*, that ſtatute is out of the queſtion here. Evidence has been given that 100 dollars have been paid, and that payment of the reſt has been refuſed, at the war office. This is a good ground of action for the deficiency.

See Paſley v. Freeman 3 *T. Rep.* 51. *and caſes there cit ed.* 1 *Salk.* 210.

The queſtion, whether *Sutherland* be liable or not, depends on this, whether the words of *Sutherland* amounted to a warranty, or only a repreſentation. They may bear either ſenſe; and you muſt judge how they were underſtood by the parties. If this be only a repreſentation, and if it be fair and honeſt, as to his belief, and without concealment of truth, or intereſt; he is not liable. If this be a warranty, he is liable, however honeſt, full, and diſintereſted it may be.

The jury found for the defendant.

PHILIP, a negro man, *qui tam*, *v.* ABRAHAM KIRKPATRICK.

1 *St. L.* 193. THIS was an action of debt for 20*l.* a penalty on the act of aſſembly againſt uſury.

John Black bound his ſon *Daniel Black*, a boy of fourteen years of age, to *Kirkpatrick*, by indenture, dated 8th *April*, 1792, until *J. Black* pay *Kirkpatrick* a bond of the ſame date of 20*l.* being caſh lent. *Black* was to find his ſon in ſufficient clothing during his ſervice; but if

not, and *Kirkpatrick* did it, *Black* was to repay it. If *Kirkpatrick* ſent the ſon to ſchool, *Black* was to pay for the *ſchooling*, and make up for the time loſt. *Kirkpatrick* was to find the ſon in ſufficient meat, waſhing, mending, and lodging. The bond mentioned was given by *J. Black* to *Kirkpatrick*, for the payment of 20*l.* being caſh lent. There was a penalty of 40*l.* in it. The lad ſerved *Kirkpatrick* four months, and twenty days, and got no cloaths from him. *J. Black* then paid *Kirkpatrick* 20*l.* but he would not give up the bond, till he alſo paid him 9*s.* and 4*d.* as intereſt on it. This *J. Black* alſo paid him; but ſaid this was not according to the bargain. 1793.

Roſs and *Woods*, for defendant. This is not uſury, but a fair tranſaction. Where there is a riſk of loſs of the money, or a failure of payment, at a day fixed, more than legal intereſt may be reſerved. The ſervice of the borrower's ſon was a pawn or ſecurity for the payment of the loan. Poſſeſſion of a houſe may be given as a pawn; a pawn may be uſed, and yet intereſt may be taken.

Brackenridge, for plaintiff. This is not a caſe of riſk. The ſervice of the boy was the agreed compenſation for the uſe of the money. If one to whom poſſeſſion of land was given, as a ſecurity for debt, retain the poſſeſſion, after he has received all that was due from the profits of the land, it is uſury. 1 *Hawk.* 527.

PRESIDENT. If money be lent, payable on a contingency, which may never happen, as the arrival of a ſhip, more than legal intereſt may be reſerved on the payment, and it is not uſury: for the lender riſks the loſs of the whole. But wherever the principal is payable at all events, and the riſk only applies to the intereſt, no more than legal intereſt can be reſerved. The principal was ſecure here, in the legal view of ſecurity: for a bond was taken for abſolute payment. The poſſible or probable inſolvency of the borrower is not one of thoſe riſks, which the law has, or, agreeably to its intention, can have in view; and will not juſtify taking more than legal intereſt. If the only object of the indenture was to give a *ſecurity* for the money lent and intereſt, a ſecurity, which, while it might be a gain, might, as if in this caſe the lad had become ſick, be none, or might be a loſs; the defendant might lawfully carry this agreement *Sharpley v. Hurrel. Cro. J.* 208. *Roberts v. Trenayne. Cro. J.* 507.

1793. into execution, by enjoying the benefit of the ſecurity (ſince the loſs might alſo have fallen on him, and ſo reduced even his principal ſum) and exacting intereſt alſo: and, on this ſuppoſition, you ought to find for the defendant. But if the meaning of the contract was, that the indenture and probable ſervice of the ſon was equivalent to the intereſt of the money borrowed by the father; then exacting intereſt afterwards was uſury, the money lent is forfeited, and you ought to find for the plaintiff. If the indenture were, of itſelf, ſufficient to aſcertain the intent of the parties, we ſhould feel ourſelves bound to give a deciſive opinion. But as it does not exclude the reſervation of intereſt beſides (as the words "caſh lent," might have been inſerted with a view to intereſt) we leave it to be explained by other circumſtances; only declaring our opinion, that, from the nature of the tranſaction, and the proviſion in the indenture, that the time, which might be loſt at ſchool, ſhould be made up to the defendant, it was the meaning of the parties, that the indenture and ſervice ſhould be equivalent to intereſt. If a certain gain was reſerved in the contract, to the lender, beſides intereſt; the contract is uſurious. And if, without any expreſs reſervation, in the contract, a certain gain, uncompenſated by expence and riſk, was taken; this taking is uſurious. If the taking be uſurious, you ought to find for the plaintiff.

The jury found for the defendant.

4 *T. Rep.* 353. NOTE.—The caſe of *Morſe v. Wilſon*, of all which have come within my knowledge, moſt nearly reſembles the preceding. To ſecure the repayment of a loan of 2000*l.* with five *per cent.* intereſt, a bond, in the penalty of 4000*l.* was given; and alſo, in further ſecurity, an aſſignment of two ſhares in a brewery, valued at 1000*l.* each; the ſurplus profits of which, together with five *per cent.* intereſt, the lender was to receive. Here it was argued, that, though the lender, by this agreement, was not ſubjected to the loſſes in trade, yet, from his reception of the profits, he was, with reſpect to others than the partners, liable for the partnerſhip debts; which might riſk, not only his intereſt, but his principal advanced. But the court held it a clear caſe. For not being liable, with reſpect to the partners, for the loſſes in trade, his principal was no farther riſked than, in the caſe of every lender, by

the insolvency of the borrower; from his being liable to debts, on the insolvency of the partners. 1793.

It will be observed, that if in this case, the lender had been immediately liable to losses contingent, it would not have been usury, and that, in the case of *Kirkpatrick*, my opinion went on the ground, that, from the relation of master and servant, he was immediately bound to maintain and provide for the borrower's son, in case of sickness, without any compensation or recourse, on the son, the borrower, or any person whatever; and that this contingency might have affected even the principal lent.

The decisions in England seem to go very far, to suppress usury. Compare the case of *Doe v. Barnard*, with the last point in the case of *Musgrove v. Gibbs*. *Esp. Ca. Ni. Pri.* 11. *Dall.* 216.

WESTMORELAND COUNTY.

September Term, 1793.

JAMES CARNAHAN, Assignee of ADAM CARNAHAN, *v.* JOHN HALL.

TO an action of debt on a bond, dated 20th *April*, 1784, and assigned 22d *April*, 1789, the defendant pleaded payment, with leave to give the special matter in evidence.

Woods, for the defendant, stated, that this bond (with others) was given in payment for a tract of land, the greater part of which was affected by a prior adverse title. To prove this, after producing an article by *Adam Carnahan*, of the same date with the bond, for the sale of a tract of land to *Hall*, and conveyance of the land, of the same date, warranting it against all former rights; he produced an office copy of a survey, reciting it as made for *George Rifler*, 23d *September*, 1776, on a warrant granted 20th *August*, 1776.

Brackenridge and *Young*, for the plaintiff, objected to this testimony, for two reasons—

1793. 1. Becauſe *Hall* has never been evicted, but is ſtill in poſſeſſion of the land; and the plaintiff is not, in this action, called on to make good his right againſt an adverſe title.

2. Becauſe, if evidence of want of title might be given, this evidence is improper to be received, without firſt ſhewing the warrant, on which the ſurvey was made: for the beſt evidence muſt be produced, or the want of it accounted for, before an inferior kind can be received; and the want of the warrant, unexplained, founds a preſumption, that, if produced, it would make againſt the defendant.

Roſs, for the defendant. We are not now trying an ejectment; but ſhewing why, on equitable grounds, the money ſhould not be paid now.

But it was agreed, that the evidence be admitted; but the points be reſerved for the opinion of the court, and be made part of the record, ſo as to be examinable on a writ of error.

The ſurvey offered was then ſhewn, containing 345 acres, and it was proved, that 266 acres of it was of the lands ſold by *Adam Carnahan* to *Hall*.

There was a verdict for defendant.

At *December* term, 1793, the opinion of the court was delivered on the reſerved points.

PRESIDENT. In this caſe two queſtions have been reſerved for our opinion—1. Can want of title, without eviction, be given in evidence, in an action for the price of land ſold?—2. Can a ſurvey be given in evidence, before the warrant is ſhewn?

1. In an action for money due, the price of land ſold, can the defendant give in evidence want of title in the plaintiff, at the time of the ſale, and an adverſe title in a third perſon, before any eviction or claim of this third perſon, and while defendant is in poſſeſſion of the land ſold.

Want of conſideration may be given in evidence.—What would be a ground for an injunction in Chancery, ought, in *Pennſylvania*, to be given in evidence. This is the moſt natural and effectual remedy. Poſſeſſion of land without title, when a ſale is in view, is nothing; it ariſes from a treſpaſs, and can be no conſideration, to make the price of the land a debt due. The

poſſeſſor remains liable to the true owner, and ought not to pay twice. The man, therefore, who, intending to buy a title, gets only poſſeſſion, gets nothing; and pays his money, or gives his bond without conſideration. If the ſeller think it a conſideration, let him come forward, and indemnify the buyer, againſt the owner. His refuſing to do this is an acknowledgement of want of conſideration. 1793.

Why then ſhould not the defendant be allowed to give this want of conſideration in evidence? Is the ſituation of the plaintiff worſe, becauſe the defendant has not been evicted? I think not. If a ſuit had been brought, to evict defendant, it would have been the duty of the plaintiff here, to defend the poſſeſſion and title, which he ſold. If the defendant had been evicted without colluſion, the judgment would have been concluſive on the plaintiff. The plaintiff muſt, at all times, be preſumed to know his own title; and now the burden of diſplaying and eſtabliſhing the adverſe title, falls on the defendant, who muſt ſhew want of title in the plaintiff, to make out want of conſideration.

Our rules of practice appear to me well enough calculated, to prevent ſurpriſe on either party. The plaintiff could not be ſurpriſed, but from his own careleſsneſs. No ſurpriſe is pretended. The ſpecial matter may be required to be previouſly ſet out. Complexity of pleading or evidence may be prevented, by an application to the court, who, I think would have it in their power, to reduce the matter, either of pleading or evidence, into ſuch a compaſs or form, as not to perplex either the jury or the oppoſite party. May not a court as well prevent any improper complexity of evidence, as an improper multiplicity of pleas, or an improper multiplicity of counts in a declaration or indictment? 3 T. Rep. 106.

Unleſs there be a difference in this reſpect, which I cannot ſee, between lands and goods, this point has been determined long ago; and want of title, without eviction, is warranted by precedent, as a good ground to recover back a price paid. Surely, then, it ought to be a good ground to prevent a payment. An action on the caſe was brought againſt L, for deceitfully ſelling ſheep, affirming them to be his, when, in fact, they were the Eaton v. Lincoln Ch. J. 474.

1793. sheep of *A.* There was a verdict for the plaintiff, and a motion in arrest of judgment, on this, among other grounds, that it was not shewn, that the plaintiff had any damage, or that *A.* had retaken them, or sued him for them. But this objection was overruled, and judgment was given for the plaintiff: for if he would tarry, till the goods were taken from him, it might peradventure be mischievous to him, and he should be without remedy. I lay no stress on the distinction between that and the present case; that, in that case, the question came directly, in this incidentally, into view: for this distinction can only be regarded, to prevent surprize. In that action, want of title was the ground of the demand; in this, it is the ground of the defence. I place them on a footing. If a man could recover back, *a fortiori*, he shall not pay. If this matter could take back the price out of the pocket of the seller; shall it not keep the price in the pocket of the buyer? If it would support an action, shall it not defeat one? Or shall the plaintiff recover money to-day, merely that he may be made to refund it to-morrow? I am of opinion, that evidence of want of title, without eviction, is proper in this action.

2. Can an office copy of a survey be given in evidence, without first producing the warrant, on which it was made?

I see no difference, in this respect, between this action, and an ejectment. For the defendant must pay, unless he can shew want of title in the plaintiff, and, of course title in another. So the question is the same, as in ejectment. Evading payment is taking from him the land. The question *cui bono*, for what use, should the survey, without a warrant, be admitted, may well be asked. The only ground, on which the survey, without the warrant, could be admitted, so far as I can see, is that, from the survey, the jury might presume a warrant. From an arrest, by a lawful officer, a warrant is not presumed. And, in this case, without any other circumstances explaining the absence of a warrant, which is the best evidence of an inchoate title, and in the power of the party; the presumption must be the other way. From its not being produced, the presumption is, that a sufficient warrant does not exist; if it do not exist,

there is no adverſe title ſhewn; and if no adverſe title be ſhewn, the verdict ought to be for the plaintiff.— The evidence of a ſurvey, therefore, without a warrant, being inadmiſſible, there muſt be a new trial. 1793.

NOTE.—This caſe never came on again; I believe, becauſe it was known that a warrant exiſted, and becauſe more had been paid to *Carnahan*, than the value of the land for which he had title.

HENRY WOODS *v.* GEORGE NIXON.

IN replevin for a horſe, the following caſe was ſubmitted to the opinion of the court, to fix alſo the damages in caſe of judgment for the plaintiff.

David Tate, in the Summer of 1791, bought a certain number of pack-horſes, for the uſe of the army under general *St. Clair*, from *George Nixon*, at 8*l.* 15*s.* each. *Nixon* delivered all but one now in queſtion, which had ſtrayed. *Tate* going on the campaign of 1791, met *Henry Woods*, to whom he owed a debt: he gave him an order to *Nixon* to receive this horſe, which he had heard had returned, that he might keep the horſe, till he was ſatisfied of this debt. *Woods* demanded the horſe of *Nixon*; who refuſed to deliver him on the order, and following *Tate*, and pretending as a reaſon a quarrel with *Woods*, procured from *Tate* an order to deliver the horſe to his ſon. *Nixon* did not inform *Tate's* ſon of this order, nor offer the horſe to him, till after *Woods* had brought this ſuit. Then the ſon refuſed to accept the horſe, becauſe *Woods* had ſued.

Young, for the defendant, made two objections to this action.

1. No action lies in the name of *Woods* againſt *Nixon*, on this tranſaction; but only in the name of *Tate*.

2. Even *Tate* could not have brought replevin for the horſe, which was never delivered to him, and of which therefore the property was not changed. Much leſs can *Woods*, to whom no delivery can be preſumed.

1793. *Ross*, argued for the plaintiff, that this action lay in name of *Woods*.

At *December* term, 1793, the opinion of the court was delivered.

PRESIDENT. I will make three queſtions—1. Whether *David Tate* could have maintained any action for this horſe?

2. Could he have maintained replevin for him?

3. Can *Henry Woods* maintain this action?

1. The objection, on the firſt queſtion is "that there was no delivery of this horſe, and till delivery, the property is not changed."

Right and enjoyment are two different things; and the one may be perfect without the other. The property, or right, abſtracted from the poſſeſſion, ariſes from the contract; and is veſted in the buyer, by the aſſent of the ſeller, who, from the time of the ſale, is indebted to the buyer for a thing in kind. Theſe principles apply to both parties. For as, if a horſe be ſold, and die in the ſtable of the vendor, between the ſale and the delivery, the vendor may have debt for the price, the horſe being the horſe of the buyer from the ſale; ſo, for the ſame reaſon, if the horſe live, and the ſeller refuſe to deliver him, the buyer, tendering the price, may take the horſe, or have detinue for him. In the caſe before us the price was paid. I ſhould be diſpoſed to conſider *delivery* only as the concluſive evidence of the completion of a previous contract, which, without the ſymbol of delivery, had veſted the right in the buyer. But there are other circumſtances, which render this caſe ſtronger. The contract was entire, for a *parcel* or *certain number* of horſes, and it cannot be ſevered at the will of one of the parties. He cannot deliver the worſt horſes, and retain the beſt. Delivery of part, without any new reſervation expreſſed, and acceptance of the whole price, as completely executed the contract, as the circumſtances could admit; and the horſe coming into, or remaining in, the poſſeſſion of *Nixon*, came into, and remained in, his poſſeſſion, as the horſe of *Tate*. *Nixon* was a mere truſtee, bailee, or finder, like any other *bona fide* poſſeſſor; and his being liable to refund the money can make no difference in the property of the horſe: for that ariſes from his obligation to deliver the horſe ſafely, and his retaining him contrary to his duty.

3 *Reeve Eng. Law* 273-4. 2 *Powell Contr.* 64. 2 *Com. Dig.* 447—8 *Ves's Jun.* 2. 42. 1 *Bac.* 863. *Cowp.* 841. *Loft.* 121. 1 *Str.* 166-7.

1793.

A husband, seized of land in right of his wife, sold 400 trees for 20*l.*; and half were taken away, and half of the price paid. The wife died, the heir entered, the husband brought debt for the other half of the money, and it was held good: the contract being good, at the time, and entire, could not be severed, having taken part, he might have taken the whole, in the lifetime of the wife. I argue, as before, the principles apply to both parties; the remedy is mutual. If seller can bring debt for the price, buyer may bring detinue for the thing sold. Detinue lies for him who has property, even though he never had possession, or his property be special, as, by heir, for an heir loom, by husband, for goods of wife, by buyer, for goods sold, or by bailee, or against bailee by him for whose use goods had been delivered. It lies, after performance of the condition, to recover back goods sold and delivered on a certain condition. It was agreed between plaintiff and defendant, that plaintiff should exchange his ship *F.* for the defendant's ship *R.* and give 25 guineas to boot, and, if the *F.* should be lost in the voyage she was then upon, 30 guineas more. Plaintiff paid defendant a guinea earnest. Afterwards defendant sent an excuse for not sending the *R.* because it had been previously sold to another.—Plaintiff required a peremptory answer, because, if the *F.* was lost, it would be to defendant's hurt, and tendered the 24 guineas due of the boot, which the defendant refused. The *F.* was lost, on another voyage. Plaintiff brought trover for the *R.* and, though it was objected, as here, that the property was not transferred, it was held that trover lay, every part of the agreement having been performed by the plaintiff, and that detinue would have lien. In *assumsit* plaintiff declared, that it was agreed, on 1st *May*, 1792, that he should give defendant a colt, in exchange for defendant's mare, and pay him two guineas to boot, on 17th *December* following; that it was further agreed, that plaintiff should keep the colt till 29th *September*; that mutual promises were made; that defendant, to make the bargain more firm, paid plaintiff one half-penny earnest; and that plaintiff kept the colt till 29th *September*, was ready, and offered to pay defendant two guineas, but defendant would not

3 *Reeve Eng. Law* 374. 2 *Esp. I.* [illegible] *Bac. Abr.* *Mod.* 245. 2 *Com.* 447 — *S.* 2 *S.* 765.

2 *Com. Dig.* 632. *Bull N. Pri.* 53.

Bates, a. c. Ellicott, Co. Ct. 866. *James, on his Trial, Legal.*

Ba[illegible], contra. Com. 5 *T. Rep.* 499.

1793. receive them, and had not delivered the mare to plaintiff, though often requeſted. To this declaration there was a demurrer, becauſe it did not appear, that the plaintiff was ready and offered to deliver the colt to the defendant, in exchange for the mare. But it was held, that there was no foundation for this objection: the payment of the half-penny veſted the property of the colt in the defendant, and therefore it was unneceſſary for plaintiff to ſhew, that he had tendered the colt to the defendant.

On theſe principles, I hold, that *David Tate* might have maintained an action for this horſe. He might have maintained *detinue*, *trover*, or *aſſumſit*.

2. Could he have maintained the action of *replevin*?

Co. Lit. 145 —6 *Woods Inſt.* 192, 570. In *England*, *replevin* lies *chiefly*, it is ſaid *only*, for goods taken by way of diſtreſs. It ſeems therefore to ſuppoſe a previous actual poſſeſſion in the plaintiff. Yet, in ſome caſes, it lies, where the plaintiff has not had poſſeſſion in himſelf, but in one under whom he claims.

Co. Lit 145. *b. Bull Ni. Pri.* 53 2 *Eſp.* 48 —9. Huſband may have *replevin*, for goods taken from his wife, before marriage; executor, for goods taken from his teſtator; lord, for goods taken from his villein, as a diſtreſs: the diſtreining did not alter the property, the goods remained in the cuſtody of the law, and the right devolved to the plaintiffs. In a caſe in *Modern Reports*, it is ſtated, without any diſapprobation, that *replevin* had been brought by one of the vendees againſt the other, for ſheep ſold by the owner to two different perſons.—Be this as it may in *England*, the practice in *Pennſylvania* has been to iſſue *replevins* in all caſes where a man claims property detained from him. By this practice, it becomes, in fact, an action of *detinue* or *trover*, with the ſpecific remedy of chancery, unleſs the defendant claim property; and as it gives a chance of more perfect and ſummary juſtice, without danger of abuſe, I am inclined to ſupport it in the liberal extent of our practice; and, ſupporting it, muſt hold, that *David Tate* might have maintained an action of *replevin* againſt *George Nixon*, for this horſe.

Dall. 156.

3 Can then *Henry Woods* maintain this action?

Let me premiſe, that *George Nixon* has ſold the horſe, and parted with all his right in him to *David Tate*, and received for him the agreed price; that *David Tate*

transferred the right of the horſe to *Henry Woods*, who thus acquired a right to demand him from *George Nixon*; and that *George Nixon*, in refuſing to deliver this horſe to *Henry Woods*, acts maliciouſly and againſt conſcience. He is not, therefore, a man to be favoured in a court of juſtice, and muſt expect our leaning to be againſt him. On the principles of natural juſtice, independent of any ſyſtem and eſtabliſhed forms, there can be no doubt, that *Henry Woods* ought to recover the horſe from *George Nixon*. But if there be any thing in our artificial legal ſyſtem, and eſtabliſhed forms of proceedings, to prevent this recovery, in the preſent action, we are bound by it: though, if we poſſibly can, we will lay hold of every thing, to reconcile to our ſyſtem and proceedings, a recovery, which natural juſtice ſo plainly dictates; ſince the only effect of a contrary deciſion would be another action, in another form, in which the horſe, or his value, would certainly be taken from the defendant, whoſe conduct has been very unjuſtifiable. 1793.

It is no objection to *Henry Woods's* recovery, that he has but a ſpecial property; for *detinue*, *trover*, or *replevin*, will lie on a ſpecial property. If *Henry Woods* had no right to demand the horſe, the defendant might ſhelter himſelf under a claim of property in himſelf or in another. He has none in himſelf, and *David Tate*, who has, comes forward, and declares, that he transferred his right to *Henry Woods*. The ſpecialty of the property, or the conditions to which it is ſubject in the hands of *Woods*, is a queſtion only between him and *Tate*, who may do what he will with his own: *Nixon*, who transferred the whole to *Tate*, has no right to call *Tate* to account for the diſpoſal of it. He was but a mere truſtee or ſtake-holder for the true owner; and, in my mind, ſtands in the ſame ſituation, as if he had never owned the horſe, but had undertaken to keep him ſafely for the owner, or had found him. There are many inſtances, in which, thoſe who had the beneficial intereſt, though no parties to the contract, from which their right muſt be derived, have been ſupported in actions againſt one of the parties: As on a promiſe to another to pay money to the plaintiff, or for goods delivered to another for the uſe of the plaintiff. *Trover*, for goods ſold, ſeems to have been

Co Lit. 145, 6. 5 *D. 6. abr.* 2 (a) 3 *Bull Ni. Pri.* 55.

5 *Bac.* 261. *Bull. Ni. Pri.* 35.

Cro. El. 164. 5 *Bac. abr.* 2 *Bull* 35, 133 —4. 1 *Eſſ.* 105-6. 2 *Eſſ.* 333 *Atkinſon v. Farmer* 2 *Eſſ.* 325. *Green v. Farmer.*

1793.

brought againſt the ſeller, by an aſſignee of the buyer, and the plaintiff recovered. *Trover* was alſo brought for goods, which plaintiff, having ſold to *A*, delivered to defendant, in the name of *A.* to dye for *A.* who, being unable to pay the price, gave up his right of them to the plaintiff, and he recovered againſt the defendant. An aſſignee of a *choſe in action* cannot ſue for it at common law, though he may in chancery. The point cited from the caſe of *Cummins* aſſignee of *Linn*, applicable to the preſent caſe, is not the point judicially, or at leaſt principally, before the court; and beſides, it is decided on the informality of the aſſignment, a preciſe form of which had been preſcribed by a poſitive act of aſſembly, and could not be varied. The queſtion, then, at laſt, ſeems to reſolve itſelf into this: Was the tranſaction between *Tate* and *Woods* an aſſignment of a *choſe in action*, which will not ſupport a ſuit at common law; or was it a ſale or tranſfer of veſted property?

4 Bac. Abr. 221. 1 Ela. 651.

Dall. 444.

Peffit vs. *Manypeny*. (*Palmer's caſe*) 5 Co. 28. Cro. El. 2 Vin. Tria. 188. 5 Bac. 261. 3 Wils. 352.

In an action of *trover* for certain loads of wood, a ſpecial verdict was found; that *P.* ſeiſed in fee of land, on which there was a great wood, ſold to *C.* and his aſſigns, as many of the trees as would make 600 cords of wood, to be taken at the aſſignment of *P.*; *C.* aſſigned his intereſt to plaintiff. Afterwards *P.* ſold to defendant ſo much of his wood as would make 4000 cords of woods, to be taken at the election of defendant. Afterwards *P.* ſet out, and plaintiff felled the 600 cords of wood; and defendant (though there was ſufficient left for his 4000 cords) took and converted them. On this verdict, it was reſolved, that judgment be given for the plaintiff (not only becauſe, though the aſſignment to plaintiff had been void, yet he having, by the felling, poſſeſſion of them, and ſo a good title againſt a ſtranger, but,) becauſe *C.* having a right to take the trees, if, after requeſt *P.* did not ſet them out to him, had an intereſt, which he might aſſign over, not a thing in action, or a poſſibility only, and the intereſt of *C.* veſted in the plaintiff his aſſignee, in the terms of the contract: for the grantor cannot, by his own act or default, ſubvert or derogate from his own grant.

This caſe goes a great way in deciding the caſe before us. At any rate, it makes me eaſy in ſaying, that the plain rules of juſtice are, in the caſe before us, con-

1793.

fiſtent with the principles of our legal ſyſtem. Between the principles laid down in the caſe cited, and the circumſtances of the preſent caſe, I ſee no difference, but that, there, the ſale was to *C.* and his aſſigns, and here the ſale is to *David Tate*. But this difference, I conceive, does not prevent the application of the principles, laid down in that caſe, to the decifion of this. For, as a grant of an eſtate in fee-ſimple cannot be reſtrained by a condition not to alien; ſo the purchaſe of a chattel implies a power to ſell again. The firſt ſeller parts with all his power over the thing ſold, and cannot reſtrain the buyer in the uſe or diſpoſal of his acquired property. If, in the caſe cited, *C.* might have taken the trees, if *P.* on requeſt, refuſed to ſet them out, the aſſignee of *C.* in whom all his intereſt was veſted, might have taken them. If the aſſignee of *C.* might have taken the trees, *Woods*, in this caſe, might have taken the horſe. If he might have taken the horſe, he might, after demand and refuſal, have brought *detinue* or *trover* for him. And if he might have brought *detinue* or *trover* for him, he may bring *replevin*.

2 *Comm.* 398.

Judgment for the plaintiff for 13*l.* 10*s.*

PUMROY RAYNE and wife, *v.* GUTHRIE and WALLACE.

AN action of debt was brought on a ſingle bill dated 12th *November*, 1787, for 29*l.* 10*s.* payable *on demand, for value received.*

Reſs, for the plaintiff, contended, at the trial, that intereſt ſhould be computed from the date of the bill;—becauſe, the words "for value received," were equivalent to money lent, and this bears intereſt, and becauſe it was commonly underſtood, that all notes or bills payable *on demand*, bore intereſt from the date; and bills and notes were ſo drawn on this preſumption.

This point was reſerved, and at *December* term, 1793, the opinion of the court was delivered.

PRESIDENT. I cannot diſcover, that it is the common underſtanding, ſanctioned judicially in *Pennſylvania*,

1793. that notes or bills *on demand* bear intereſt from the date. In the Supreme court, the law, with reſpect to intereſt, is ſtated in the ſame manner as in *England*. "In the caſe of promiſſory notes, where a day certain is fixed for payment, intereſt is allowed from that day. Where no certain day is fixed, it is payable from demand." It is from judicial, and not indiſcriminate, opinions, that we muſt take the law of *Pennſylvania*. And, without any publicly eſtabliſhed rule, to ſay that a note for a certain ſum of money on demand, ſhould, on demand, be a note for that ſum and more, ſeems contrary to the agreement of the parties. The creditor, by a demand, may intitle himſelf to intereſt, when he pleaſes. If parties will not explain their own words, they muſt leave them to the conſtruction of the law. We muſt not change fixed rules from mere private opinions. The general rule is, that intereſt muſt be paid from the time that the principal ought to have been paid. "For value received," is a mere formal expreſſion, and cannot put this money in the ſtate of money lent.

Jacobs v. Adams. Dall. 52.—*See alſo* Dall. 256, 313. 2 *Bla. Reb.* 661. 3 *Wils.* 205. 6. 2 *Bro. Cha.* 2. *Veſey jr.* 17.

NOTE.—Yet intereſt is recoverable on a ſettled account from the date of the ſettlement.

WASHINGTON COUNTY.

September Term, 1793.

STEPHEN PARR *v.* DAVID JONES.

THE declaration ſtated, that in conſideration of two books and ſilver ſpurs ſold to *Jones* by *Parr*, *Jones* promiſed to give to *Parr* a tract of land on *Grave* creek flats, then in the poſſeſſion of one *Tomlinſon*, but the property of *Jones*, and to pay *Parr* for all improvements, which he ſhould make on *Jones's* land; that *Parr* improved four years, made houſes, gardens, meadows, fences, &c. and that *Jones* did not furniſh the tract of land, nor pay for the improvements made, though requeſted.

Brackenridge opened the caſe for the defendant. The *Indians* at the treaty of fort *Stanwix* ceded land to *Pennſylvania*, between the *Ohio*, the *Kanawa*, and *Laurelhill*, within which they had previouſly granted large tracts to ſeveral perſons, as to *George Croghan*, and to the *Indiana* company, to recompence certain damage done to their property, or to *Baynton*, *Wharton*, and *Morgan*, the principal ſufferers, for the uſe of themſelves and the others. This grant not being efficient till confirmed by the crown, they went to *England*, to have it confirmed; but the war breaking out, nothing was accompliſhed. In 1772, *Jones* had been employed by the *Indiana* company, as an enterpriſing man, and a clergyman, to endeavour to form a ſettlement on their lands, and for this ſervice he was to have an equivalent. One *Davis*, a young clergyman, came with *Jones* for this purpoſe; but dying by the way, he left it in charge on *Jones*, to provide for *Parr*, his brother in law, (whom *Jones* had never ſeen) a ſettlement in the *Indiana* grant, with himſelf and other ſettlers. *Margaret Davis*, ſiſter and executrix of *Davis*, the clergyman, gave *Jones*, as a memorial of her brother's reſpect for him, *Doddridge's* tranſlation of the New-Teſtament, in two volumes, and a pair of ſilver plated ſpurs. 1793. *Ante p.* 9.

It was proved, that in 1772, *Jones*, having laid out lots of 320 acres each, for the ſettlers, and, among the reſt, one to *Parr*, *Tomlinſon* oppoſed the ſettlement.—Whereupon *Jones* told *Parr*, that, till he could get poſſeſſion of his own lot, he might occupy and improve a tract of land, which *Jones* had, and now holds, under another right ſince acquired, by patent from the ſtate of *Virginia*. *Parr* went on this land, built a ſmall ſtable, and cleared about ſeven acres, of which one and a half was meadow ground. *Jones* was to pay *Parr* for the improvements he made, but the cleared land was never meaſured, nor any demand made of the compenſation — *Parr* knew the ſituation in which *Jones* acted, and the ſtate of the title to the land, to be as ſtated by Mr. *Brackenridge*. There was evidence, that the books and ſpurs were given as a preſent; and, though this was ſlightly impeached, yet no evidence was given, that they were a conſideration for ſelling or procuring a tract of land.

PRESIDENT. There are two promiſes laid in the declaration:

1793. 1. To furniſh *Parr* with a tract of land on *Grave*-creek;

2. To pay for improvements on *Jones's* tract, on which *Parr*, till he could get poſſeſſion of his own, was permitted or deſired to ſettle. For a breach of either or both of theſe promiſes, and of theſe only, damages may be given.

It appears, *Parr* underſtood the views and authority of *Jones*, and there is no appearance of deception. *Parr* knew the title under which *Jones* promiſed him the land, and knew, that, if that title failed, *Jones* had no other.—*Jones* was but an agent. The conſideration which he received from his employers, makes him anſwerable to them for his conduct, but does not make him liable to others as a principal.

1. Shall *Parr* have damages then, for not getting a title to the land? Not from *Jones*, for he was but an agent; nor from any body, for the title has failed, from a cauſe within the view of all the parties, and there is no abſolute warranty.

2. Shall he have *Jones's* tract? It was not in the view of *Parr* to have this. If it had been, before he could receive *Jones's* tract, or damages inſtead of it, he muſt pay the purchaſe money; and *Jones* offers it on a reaſonable compenſation.

3. Shall he have the value of his labour? He ought firſt to have aſcertained the quantity of land which he cleared, and have given notice of it to *Jones*, and demanded the price.

By conſent there was a verdict for 7*l.* without coſts.

Pennsylvania *v.* John Huffman.

Huffman was indicted at *June* ſeſſions, 1793, for that he, on the 4th *April*, 1793, feloniouſly did falſely make, forge, and counterfeit, and did cauſe and procure to be falſely made, forged, and counterfeited, a certain receipt, purporting to be ſigned by *Robert Lucky* (then deceaſed) in his lifetime, with the name of the ſaid *Robert Lucky*, the tenor of which receipt is as follows, (to wit)

"*fapruary 4th* 1793 *Than Received of John Huf-* 1793.
man fifty puſhel of wheat for the uſe of Hugh Briſon I ſay Received by me

"*Robert Luckey.*"

with intent to defraud the repreſentatives of the eſtate of the aforeſaid *Robert Lucky*, deceaſed, and with intent to defraud the aforeſaid *Hugh Briſon* of the value of the ſaid fifty buſhels of wheat.

It appeared in evidence, that *Lucky* was owner of a mill, and was indebted to *Huffman* on a judgment, that his land was encumbered by prior judgments, and that he died inſolvent. This receipt appeared as given for wheat put into *Lucky's* mill, and, after the death of *Lucky*, was delivered to *Briſon* by *Huffman*, as payment for wheat, which *Huffman* owed to *Briſon*. The receipt was written by *Huffman*, and he being a *German*, and writing *p* for *b*, was expreſſed as for fifty *puſhels* of wheat for the uſe of *Hugh Priſon*. The ſignature was proved not to be the hand writing of *Lucky*, and he, at the date, was ſick, and did not attend the mill, and no wheat was then delivered by *Huffman*.

Roſs, for the defendant. You cannot find *Huffman* guilty on this indictment—1. Becauſe there is a variance between the receipt ſtated in the indictment, and the receipt produced in evidence. The receipt in the indictment is for the uſe of *Hugh Briſon*. The receipt produced in evidence is for the uſe of *Hugh Priſon*.

2. This indictment lays the offence to be againſt the act of aſſembly. It is not one of the offences ſtated in the acts of aſſembly. 1 *St.L.* 5, 64.

3. The evidence is not ſufficient to convict. *Huffman* had a bond and judgment on *Lucky*, and, from prior incumbrances, had no other method of getting his money, but by obtaining this receipt from *Lucky*. *Huffman* never pretended that he had delivered wheat.

PRESIDENT. You may read the receipt, as the defendant intended it, as for fifty buſhels of wheat for the uſe of *Hugh Briſon*, and find a general verdict of conviction. But if you are not ſatisfied with this, you may find a ſpecial verdict.

The jury found him guilty of forging a receipt for fifty *puſhels* of wheat, for the uſe of *Hugh Priſon*, and putting the name of *Robert Lucky* to it.

1793. *Roſs* moved in arreſt of judgment, on the variance between the indictment and the verdict.

Bradford, for the ſtate, being aſked by the court whether he had any hope of being able to ſupport this verdict, ſaid, he thought he could, and would look into it.

He afterwards gave it up, and deſired that the defendant ſhould be bound over to anſwer to another indictment.

At *June* ſeſſions, 1794, *Huffman* was tried again, on another indictment, drawn up in the ſame words as the former, except that this one ſtated the receipt for the uſe of *Hugh Priſon*.

To this indictment he pleaded a former conviction.

Roſs, for defendant, on this plea, read and relied on 2 *Hale's P. C.* 244-8.

2 *Hale* 244 5. PRESIDENT. The caſes cited by Mr. *Roſs*, are caſes of acquittal on the merits, where the difference in the two indictments is chiefly circumſtantial. Perhaps the ſame reaſons which would preſerve a preſumed innocent man from a ſecond trial, would not preſerve a preſumed guilty man. On the merits, *Huffman* has been convicted of a forgery, though not of the forgery ſtated in the indictment on which he was tried. On the former indictment and verdict, no judgment could be given, becauſe the verdict did not find the offence laid in the indictment; and becauſe that indictment for forging the note ſtated in it, could be no bar to another indictment, for forging the note given in evidence.—The error is apparent on the record. And to ſay now, that this is an indictment for the ſame offence, would be, in fact, ſaying, that we ought to have given judgment on the former indictment. To let *Huffman* eſcape now, by ſaying, that *Briſon* and *Priſon* are the ſame, would be contradictory to the principle, on which he formerly eſcaped, that they are different. I ſhould have thought this caſe the ſame, if, inſtead of a ſpecial verdict, there had been an acquittal, on account of the variance. For I go upon the principle, that the former indictment, ſtating a different offence from that ſtated in the preſent, is no bar to proceeding on this indictment. This plea therefore cannot avail the defendant.

Vaux's caſe, 4 *Co.* 44. 2 *Hawk.* 536 —7.

Cogan's caſe, *Leach*, *Crown Law* 389.

On the trial of the general iſſue, the evidence was to the ſame effect as before; and the jury found a general verdict of conviction.

Roſs, for the defendant, (who was a wealthy man) moved in arreſt of judgment;—1. Becauſe the indictment is laid as a felonious forgery, and againſt the act of aſſembly, when it is not a felony under any act of aſſembly; and, 1793.

2 *Hawk.* 320-6.

2. Becauſe it is laid to defraud *Hugh Priſon*, when there is no ſuch man, and the repreſentatives of *the eſtate* of *Robert Lucky*, when it ought to have been the repreſentatives of *Robert Lucky*.

Leach's Cro. Law 239.

Bradford, for the ſtate, read *Henry Lavel's* caſe.

ib. 77.

Mr. *Roſs* was very importunate that no opinion ſhould be given, till he ſhould have an opportunity of arguing this caſe again, which, on account of his abſence, was not till *March* ſeſſions, 1795, when he reſted on the ſame points as before, and cited *Weſtbeer's* caſe. *Leach's Cro. Law* 13. He alſo moved for the remiſſion of the defendant's recognizance, forfeited for abſence. This was granted on the terms of his paying reaſonable coſts to the witneſſes at both trials. Sentence was then paſſed in the terms of the act of aſſembly of 1705, againſt counterfeiting hands and ſeals.

1 *St. L.* 64.

Pennsylvania *v.* Andrew Sullivan.

THIS was an indictment for a rape on *Sarah Sutherland*, on 19th *June*, 1793.

Roſs, for the priſoner, ſuggeſted that both penetration and emiſſion muſt be proved; though he admitted, that this opinion had been doubted by lord *Hale*. He urged alſo the incredibility of the teſtimony.

12 *Co.* 36-7. 1 *Hawk.* 60. 1 *Hale P. C.* 628.

President. *Emiſſio ſeminis* of itſelf makes not rape without actual penetration, but it is ſaid that, as evidence of penetration, it is proper evidence on a trial for a rape. The offence of the crime is not the begetting a child, which cannot be done without emiſſion; but the violence done to the perſon and feelings of the woman, which is completed by penetration, without emiſſion. We are therefore inclined to be of lord *Hale's* opinion, that the crime is ſufficiently proved, when penetration is proved. If, together with penetration,

1 *Hale* 628.

Woods' Inſt. 370.

1793. emiſſion muſt be proved, may not the raviſher prevent proof of his crime by onaniſm? Or is it to be expected, *Gen. xxxviii. 9.* that the woman, eſpecially agitated by ſuch outrage, ſhould be able to give explicit proof of this circumſtance,

The jury found him not guilty.

PENNSYLVANIA *v.* ANDREW SULLIVAN.

vid. 1 *Hale* 559. 560. 2 *Hawk.* 624-5 *Kel.* 30. 52. 2 *Hale* 245-6

TOGETHER with the indictment for a rape, another indictment was preferred and found for a burglary, on 19th *June*, 1793. in breaking and entering the houſe of *Alexander Sutherland*, and *committing a rape on Sarah Sutherland*. The rape laid here as *committed*, is the ſame of which the priſoner had been juſt before acquitted; and there was no count laying the burglary as breaking and entering with *intent* to commit a rape; Mr. *Bradford*, however, agreed with Mr. *Roſs*, that this caſe ſhould be tried by the ſame jury, which tried the preceding; and the priſoner was acquitted.

JACOB NESSLY *v.* ANDREW SWEARINGEN.

THIS was an action of covenant on articles to convey land.

Swearingen had purchaſed 500 acres of land from *David Shepherd*, and ſold it to *Neſsly*, who had alſo purchaſed from *Shepherd* 500 acres of land, adjoining the firſt. *Shepherd* conveyed 1000 acres to *Neſsly*, telling him that 500 of theſe were on *Swearingen's* account.—*Shepherd* had not title to more than 1000 acres. *David Shepherd* being produced as a witneſs, was objected to, as intereſted.

PRESIDENT. If the plaintiff ſucceed, the defendant will ſue *Shepherd*, on his contract to convey to him. If the defendant ſucceed, the plaintiff will ſue *Shepherd*, on his contract to convey to him. Thus being equally bound to both, he ſtands as indifferent between them, as if bound to neither, and is a competent witneſs.

The opinion of the court was delivered to the jury in favour of the defendant; and the plaintiff then ſuffered a nonſuit.

JAMES HILL *v.* NATHANIEL WALLACE.

ON an appeal from the judgment of a juſtice of the peace, *Hill*, the plaintiff, declared in *aſſumſit*, for 3*l.* 16*s.* for goods, wares, and merchandizes ſold. The evidence was of wheat delivered into the mill of *Wallace*, the defendant, generally, without ſtating any particular purpoſe. 1793.

Bradford and *Purviance*, for the defendant. The juſtice was right in giving judgment againſt *Hill*, even though the wheat had been received and miſapplied by *Wallace*: for only *trover* will lie in this caſe, and a juſtice has no cogniſance of *trover*. This is no ſale, nor delivery for the uſe of the defendant, but a delivery for the uſe of *Hill*. Therefore, *trover* is the only proper action. *Aſſumſit* is not maintainable, and there ought to be a nonſuit. 1 *St. L.* 309.

Roſs, for the defendant. The delivery of the wheat is clearly proved, and will ſupport *aſſumſit*, an action rather to be favoured than *trover*. 3 *Comm.* 161—3. *Comyn.* 290-4, 377.

PRESIDENT. We do not think ourſelves at liberty to direct a nonſuit; for we cannot ſay, that it is *impoſſible* for the jury to preſume a ſale.

There are two queſtions:—

1. On the merits, whether the wheat was delivered.

2. On the form of the action, whether the evidence ſupports it.

1. The firſt queſtion we leave to your determination.

2. On the ſecond, it has been contended, that no action will lie, but *trover*. There is no foundation for this opinion. Were this true, and the wheat were loſt or ſtolen, from the greateſt negligence, its owner would have no remedy; for, in ſuch caſe, there would be no converſion, and, without converſion, *trover* could not be ſupported. It is clear, that *aſſumſit* will lie.

But the true diſpute in this caſe has not been touched on. The real diſpute is not whether *trover* or *aſſumſit* lies; but whether this ought to be a ſpecial *aſſumſit* inſtead of a general *indebitatus aſſumſit*, as it is.

If from the circumſtances of this caſe, and the courſe of this trade in this country, you can preſume a ſale, this action will lie.

The jury found for the plaintiff 2*l.* 5*s.* 6*d.* damages.

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ALLEGHENY COUNTY,

December Term, 1793.

DAVID IRWIN *v.* JOHN RANKIN.

1793. THIS was an action on the case, for selling a horse for 20*l.* assuming that he was sound, when, in fact, he was unsound, and of that unsoundness died.

It was proved, that *Rankin*, in selling the horse, said, he had been overheated, and was foundered; but that he would warrant him sound in other respects. The horse, after being worked sometime, died two weeks after the sale; and there were opinions, that he had been affected, for some time before the sale, with the disease of which he died.

Bradford, for the defendant, argued, that there was no fraud in the contract, that the sale was fair, and that the death of the horse was owing to his having been over-worked.

PRESIDENT. This action goes not on the foundation of fraud. The evidence proves none. And your verdict, going no farther than the *allegata* and *probata*, the facts alledged in the declaration and proved by testimony, cannot establish against the defendant any charge of fraud, nor acquit him of it. Your verdict must go on another point entirely, the undertaking that the horse was sound. The question then is, what was the state of the horse, at the time of the sale. If he was only overheated or foundered, and the subsequent death was the effect of being worked after over-heating and foundering; *Irwin* must bear the loss: for *Rankin* sold him as an over-heated, and a foundered horse. If, on the contrary, the horse was, at the time of the sale, unsound of a disease, of which he afterwards died; *Rankin* must bear the loss; allowing for the profit, if any, made of the labour of the horse subsequent to the sale.

When the jury returned, and were ready to give a verdict, the plaintiff suffered a nonsuit.

PENNSYLVANIA *v.* JAMES HONEYMAN.

HONEYMAN was indicted for the murder of *Benjamin Aſkins*, on 23d *November*, 1793.— *Aſkins*, *Honeyman*, and two others, *Ward* and *Faris*, had been drinking together, and were dancing in *Aſkin's* houſe. *Ward* ſhoved *Faris*, who complained of it.— *Ward* aſked if he reſented it. *Aſkins* ſaid, if he did not, he would; and he threw off his cloaths, and ſtruck at *Ward*, who kept off the blow, and left the houſe. *Honeyman* called after him to come back, and ſee it out, and he would ſee fair play. *Ward* would not. *Honeyman* turned to *Aſkins*, ſaid, "You are a damned raſcal, to ſtrike a man before he is ready," knocked him down, ſtamped on him, and beat him. Two or three times, as *Aſkins* raiſed himſelf to his knee, *Honeyman* knocked him down, telling him, "*Ben*, if you know when you are well, lie ſtill." *Aſkins* died the next day of the bruiſes. He was a puny weak man; *Honeyman* was a ſtout young fellow. 1793.

Brackenridge and *Carſon*, for the defendant. Fighting on a ſudden quarrel, and killing, is only manſlaughter. We admit, this is manſlaughter. Though implied malice be ſufficient to make the killing murder, ſtill there muſt be malice. If there be no circumſtances of malignity, or, if the killing be ſudden, or with a weapon not likely to kill, there is no ground for implying malice. Here there is no deliberate deſign. The parties were in liquor. *Aſkins* and *Honeyman* were in terms of friendſhip. *Aſkins* violated the peace in his own houſe. *Honeyman* wanted to repreſs him, and what he did was in defence of his friend. 1 *L. Ray.* 143, 4 *Comm.* 191. *Foſter* 255, 290. 12 *Co.* 88.

Galbraith, for the ſtate, contended, that from the evidence, and the law ariſing out of it, the killing was murder.

PRESIDENT. The unfortunate ground of this crime, is that riotous intemperance, ſo dangerous, on all occaſions, eſpecially in ungarded and unprincipled company.

This is not juſtifiable homicide, not having happened in the diſcharge of any duty; nor is it excuſeable, not having happened in ſelf-defence, or by accident. It

1793. must, therefore, be felonious homicide: and the queſtion is whether it is murder or manſlaughter.

1 Hawk 124. *Prima facie*, every killing is murder, for malice is preſumed, unleſs the priſoner ſhew extenuating circumſtances, which take away the preſumption of malice. If there be no malice, it is but manſlaughter. If there be expreſs malice, or malice implied in the circumſtances of the tranſaction, it is murder. The diſtinction between murder and manſlaughter is nice; and caſes lying on the borders of both have been often, and long and earneſtly diſputed, and doubtfully decided. Hence ſo many ſpecial verdicts, to find whether manſlaughter or murder.

Hugget's caſe, *L. Ray*, 143. *Kel.* 59. *Thomſon's ca. Kel.* 66 *See Kel.* 119 136. *L. Ray*, 1485 *Foſter* 313, 255, 262. *L. Ray*. 1488-9 1493. *Kel.* 112, 115.

I have ſaid, that every voluntary killing, or every act, which apparently muſt do harm, which is done with intent to do harm, and done without provocation, and of which death is the conſequence, is murder; for provocation is not preſumed, and malice is preſumed: the law implies malice, and the defendant muſt ſhew provocation, to rebut the preſumption of malice. But malice may be more than implied; it may be expreſs.

L. Ray. 1489. *Kel.* 127. Malice expreſs is a deliberate or formed deſign of taking away the life of another, or of doing him ſome bodily miſchief: and this may be manifeſted either by words or actions. Implied malice is collected either from the manner of the killing, or from the perſon killed, or the perſon killing. In wilful poiſoning, in killing, though undeſignedly, by a voluntary act, apparently miſchievous, or in killing without provocation, malice is implied from the manner of the act: and it is not neceſſary, that the malice ſhould have exiſted long before, it is ſufficient, if it exiſt at the time.—Malice, as uſed in the definition of murder, is a technical expreſſion, and not to be taken in the common ſenſe of that word. In common acceptation, malice is taken to be a ſettled anger in one perſon againſt another, and a deſire of revenge. But in this legal or technical acceptance, it imports a wickedneſs, which includes a circumſtance attending an act, that cuts off all excuſe. It is uſed as ſynonymous to frowardneſs of mind; and means, that the fact hath been attended with ſuch circumſtances, as are the ordinary ſymptoms of a wicked, depraved, malignant ſpirit, the plain indications of a

L. Ray. 1488, 1493. 1 *Hawk* ch. 31, § 32 41, 46 47 9. 1 *Hale* 472. *Foſter* 259. *L. Ray* 1507. *Kel.* 126-7.

25 *H* 8 *c.* 33. *Foſter* 255 7. *Kel.* 127.

heart regardleſs of ſocial duty, and fatally bent upon miſchief. It is a deſign of doing miſchief, a voluntary cruel act. Malice, therefore, is implied in every act of killing, for which there is no legal juſtification, excuſe, or extenuation. 1793.

The excuſe for murder ariſes from authority not wantonly or cruelly exerciſed or abuſed, or from the infirmity of the human conſtitution. A father may correct his child, or a maſter his ſervant, apprentice, or ſcholar, in a reaſonable manner; and if an accidental death enſue, it is only manſlaughter, or perhaps homicide *per infortunium*. But if the correction be unreaſonable, with unuſual or improper weapons, or with extraordinary circumſtances of cruelty, and if death be the conſequence of it; ſuch killing is murder. Such would be the caſe of a killing, by any perſon, in the preſervation of the peace. If one, having no authority over another, but provoked to paſſion by an act of perſonal violence, in his paſſion, beat the perſon thus violently provoking him, and, by ſuch beating, kill him, it is but manſlaughter: paſſion excludes the preſumption of malice. But if the provocation was not ſufficient, or whatever it might have been, if there was no paſſion excited, or, though excited, if there was time for the paſſion to cool, and it had ſubſided; the killing is murder. Cool expreſſions, wanton, and deliberate or unuſual cruelty, are evidences of want of paſſion, and are therefore evidences of malice. Suddenly interfering, in favour of a friend engaged in combat with another, and killing the other in defence of this friend, has been held but manſlaughter. This muſt be on the ſuppoſition of paſſion excited by the danger of the perſon, in whoſe favour the killer interferes in the quarrel.

Kel. 28, 64, 65, 127, 132-3. *4 Bl. Com.* 182. *L. Ray.* 144, 1498. *1 Hale* 473. *4 Com. Dig.* 20.

Kel. 60, 61, 63, 135, 119, 128. *1 Hawk.* c. 31. § 21. 38, 39. *L. Ray.* 1495.

12 Co. 87. *Kel.* 60-1.

The jury are the judges whether the facts be true or not; the court muſt judge of what deſcription the crime is, which thoſe facts compoſe, whether murder, manſlaughter, or inferior homicide: for that is defining or explaining what the law is; and this is the duty of the court.

Kel. 50. *L. Ray* 1493-4. *Foſter* 255.

It becomes our duty, therefore, to ſay, on the ſuppoſition, that the facts ſtated, and not contradicted here, were what really happened, whether they amount to manſlaughter only, or to murder. This depends on

1793. whether *Honeyman* acted with malice aforethought, in its legal ſenſe. And this depends on whether he acted on ſufficient provocation and in paſſion.

He had no provocation. The provocation was to *Ward*. There was no occaſion to interfere in favour
Foſter 315. of *Ward*; for he had left the houſe, and was out of the reach of danger, if he had ever been in any, from *Aſkins*. *Aſkins* was preſerving (however improperly) the peace of his own houſe. *Honeyman* had no right to interfere; and we ſee no intereſt that he had in *Ward* more than in *Aſkins*, nor any motive, but the love of miſchief. If even there had been provocation, (and there was none) *Honeyman* appears to have been cool, and without paſſion. As he knocks down *Aſkins*, he ſays, "If you know when you are well, *Ben*, lie ſtill." His acts are voluntary, wanton, deliberate, and cruel, to a poor weak man; they are the ſymptoms of a froward mind, of a wicked, depraved, and malignant ſpirit; the plain indications of a heart regardleſs of ſocial duty, and fatally bent upon miſchief: they therefore manifeſt malice aforethought; and this killing is murder.

The jury found him guilty of murder: and ſentence of death was paſſed on him. An application was made for a pardon—and, on a reference to the attorney general, he ſuggeſted, as an error in the indictment, that the epithets, *feloniouſly*, *wilfully*, &c. applied to the aſſault, were not alſo applied to the ſtroke.* On this a writ of error was brought. What the iſſue of this was, or whether *Honeyman* was pardoned, I know not.†

* See *Walker's* caſe 4 *Co.* 41-2.

† See 2 *Dall. Rep.* 228, where the judgment in this caſe is reverſed.

JOHN CHAMBERS & DAVID BOYD, *v.* JOHN CRAWFORD and JOSEPH BARKER.

CHAMBERS and *Boyd* employed *Crawford* and *Barker*, boat-builders, to build for them a *Kentucky* boat, for conveying them and their families down the *Ohio*. The boat was built, delivered, and loaded; but

had not proceeded many miles, till ſhe took in water, and continuing to do ſo, ſunk about a mile below the mouth of *Turtle-creek*, in the *Monongahela*. The goods aboard, worth upwards of 100*l.* were loſt. The plaintiffs paid the defendants 14*l.* for the boat, being about a dollar *per* foot in length. They brought *aſſumſit* on an undertaking to build a ſufficient *Kentucky* boat, averring it inſufficient, and thereby loſt with the goods. 1793.

Roſs, for defendants. One not a workman is not liable for inſufficient work, without an expreſs promiſe. A workman is, without a promiſe. The defendants are workmen, and liable without a promiſe. But to what? Only to damage for time loſt in getting a better boat. The employer ought not to accept the boat, and then, after a loſs, come on the workmen for inſufficient workmanſhip. The employer ought to examine the work at the time, and then either accept or reject it concluſively; and he is bound by his acceptance; and cannot afterwards ſay, that the work is bad. The loſs that has happened is, in a great meaſure, owing to their own careleſsneſs, in tying the boat inſufficiently to the ſhore.

Brackenridge, argued for the plaintiffs, and drew a lively picture of their damage and diſtreſs.

PRESIDENT. If a workman does work inſufficiently, he is anſwerable for all conſequences ariſing from this inſufficiency, notwithſtanding an acceptance by the employer, without objections; for the employer is not to be preſumed acquainted with the execution of the work, and the workman muſt be. If the loſs, in this caſe, happened through ſuch careleſsneſs or accident, as, in the caſe of a ſufficient boat, would have produced the ſame effect, you will find for the defendants. But if the loſs happened through the inſufficiency of the boat, meaſuring that inſufficiency by the expreſſed intention of the parties, and the uſage of the trade, you will find for the plaintiffs, with damages adequate to their loſs.

The jury found for the plaintiffs 62*l.* 10*s.*

WESTMORELAND COUNTY.

December Term, 1793.

Thomas Horsefield *v.* Craft Cost.

1793. TO an action of *trover*, for a *United States* certificate of 41*l.* payable to bearer, brought to *March* term, 1793, and laying the converſion on 1ſt *October*, 1792, the defendant pleaded the general iſſue, and the ſtatute of limitations.

In a ſuit before a juſtice of the peace, in *September*, 1785, judgment had been given againſt *Horſefield*, for 3*l.* 5*s.* 10*d.* *Coſt* became ſecurity for this debt, and *Horſefield* having left the country, the juſtice, about a year after the judgment, at the deſire of *Coſt*, who had this certificate of *Horſefield* in his hand, iſſued an execution, on which *Coſt* gave up the certificate to the conſtable, for ſale, who after the uſual notice, ſold it to *Coſt* for 5*l.* The ſale was open and fair, and the price ſuppoſed reaſonable. No demand of the certificate was made of *Coſt* till *January*, 1793, when demand was made by *Horſefield's* attorney. *Coſt* refuſed to give it, ſaying he bought it at conſtable's ſale, and that *Horſefield* was yet in his debt. Together with the demand, an offer was alſo made to pay *Coſt* the debt due him by *Horſefield*.

Roſs, for the defendant. The material points in *trover* are property and converſion. This certificate was left for ſafe cuſtody. A pawn cannot be ſold by the private authority of the pledgee; but if he ſue, he may take the pawn in execution, and ſell it by authority of law. The ſale by the conſtable, and the purchaſe made by *Coſt*, a public and notorious act, was clearly a converſion, and the ſtatute of limitations, running from that, bars this action.

1 *Bac.* 237-8. 2 *Eſp.* 359. *Brackenridge*, for the plaintiff. The property of goods pawned is not altered, but remains in the pawnor, to be redeemed at any time. The ſtatute of limitations does not prevent our recovery. The cauſe of action accrues only from demand and refuſal. No ſuit could have been

brought without ſuch demand and refuſal. The ſale is the act of *Coſt*, and wholly of his contrivance. You ought to give in damages the value of the certificate at the time of the demand, that is 41*l.* with intereſt. 1793.

PRESIDENT. There are three queſtions:—1 Whether there be property in plaintiff?—2. Whether there be a converſion by defendant? and,—3. When this converſon was? On theſe a fourth queſtion may ariſe,—What damages ought to be recovered?

There can be no doubt, that a certificate, the property of the plaintiff has been converted to the uſe of the defendant. But if the defendant has done this in a legal manner, the plaintiff is bound by it. For, to ſupport *trover*, there muſt be a wrongful converſion.

If this property had been ſuch as might be taken in execution, as a horſe or other chattle, clearly *Coſt* had a right to give it up to ſatisfy the execution for the ſatisfaction of which he was ſecurity, and to ſave himſelf; and the purchaſe at the conſtable's ſale would have been legal, and the converſion juſtifiable. It would be ſtrange if the ſurety muſt give up his own goods, when he can give goods of the debtor. And though there be ground to doubt, whether this certificate could be *taken* in execution, there can be no doubt, that it might be *given* in execution. Being payable to bearer, it is transferable by delivery without aſſignment; and its real value being depreciated below the value apparent on the face of it; it ſeems to have been a proper article to bring to market to aſcertain its value. Why then, might not *Coſt*, left with the cuſtody of this certificate, and burdened with the payment of this debt, have *given* this certificate in execution for this debt, in the ſame manner, as *Horſefield* himſelf might have done?

Francis v. Nash Ca. temp. L. Hardw. B. R. 53.

But, without ſaying any thing certainly on this point, we muſt, on the third queſtion, at what time the converſion was made, clearly decide this caſe, in favour of the defendant, on his plea of the ſtatute of limitations. Demand and refuſal is not a converſion, it is but evidence of a converſion, of which there may be other evidence. Though demand and refuſal be frequently the only evidence that can be given of converſion, yet, if converſion can be proved, without proving demand and refuſal, they need not be proved. The converſion

1 St. L. 95. *10 Co.* 56-7.

1793. here was at the time of the ſale. Since that time, the plaintiff has ſuffered more than ſix years to elapſe, without bringing an action; and this action now brought, after ſix years, is therefore barred by the ſtatute of limitations; and you muſt find for the defendant.

The jury found for the defendant accordingly.

WASHINGTON COUNTY,

December Term, 1793.

JAMES BUCHANAN *v.* HENRY TAYLOR.

THIS was an action on the caſe againſt a juſtice of the peace, for wilfully and oppreſſively iſſuing an execution againſt the goods of the plaintiff, *Buchanan*, on a judgment given againſt him by the defendant, the juſtice, at the ſuit of *Peter Peterſon*, for 3*l.* 18*s.* when the ſaid judgment was ſatisfied, of which the defendant had notice.

Peterſon had put into the hands of *Taylor* ſundry notes or claims for money due, and, among the reſt one againſt *Buchanan*, on which this judgment was given. *Peterſon* being in want of money, applied to one *Fink*, who lent him a certain ſum, on *Taylor* becoming ſurety, which he did on condition, that he ſhould be at liberty to apply the money due on the judgments before him, when it came into his hands, to the payment of the money borrowed from *Fink*. *Peterſon* agreed to this. *Buchanan* was preſent, and told *Fink*, that, *as to the money due by him, it was a juſt debt, and he need not fear its being paid.*

Fink demanding payment of the money lent, an execution was iſſued againſt *Buchanan*, who, having ſome other dealings with *Peterſon*, went to him and procured from him a receipt for 3*l.* 18*s.* to be ſet up againſt the judgment confeſſed by him before *Taylor*, to which *Buchanan* ſaid *Taylor* would agree. This receipt was ſhewn to *Taylor*, and he was deſired to allow it in the execu-

tion. But he refuſed, becauſe the money had been appropriated to ſatisfy the debt due to *Fink*, and that debt was not yet ſatisfied. The execution was proceeded in; and a horſe of *Buchanan's* was ſold for 5*l.* to a friend of his, who ſold him back to *Buchanan* for 12*l.* On this the claim of damages was founded, and they were laid at 20*l.* The money made on the execution was paid over to *Fink*. Notice of this ſuit had been given to the juſtice, according to the act for rendering juſtices of the peace more ſafe in the execution of their office, &c. 1793. 1 *St L.* 604.

Reſs, argued for the defendant, that *Peterſon* having aſſigned the money due on this judgment, to a certain purpoſe, had no further control over it; and that a juſtice was only anſwerable for corruption, oppreſſion, partiality, or malice: none of which exiſted here; for the conduct of the juſtice was fair and honeſt. 1 *Burr.* 561-4. 2 *Burr.* 719-22.

Bradford, for the plaintiff. *Peterſon* remained in the character of plaintiff before the juſtice, and had control over the judgment. The juſtice was judging in his own cauſe.

PRESIDENT. An aſſignment, though not in all the forms of law, veſts the equitable intereſt in the aſſignee; and the aſſignor will not, afterwards, be permitted to exerciſe any authority over the property aſſigned. It is indifferent whether the equitable aſſignment be in writing, by parole, or by the mere delivery of the muniments or evidences of right. If a debtor, who has paid a bond, ſtands by, and ſees it aſſigned for a valuable conſideration, and, concealing his payment, declares the debt juſt, he ſhall pay it again to the aſſignee. After the appropriation by *Peterſon* of his debt on *Buchanan*, *Peterſon* had no longer any authority over it, till the object of this appropriation was ſatisfied. *Fink* is the real aſſignee, for he had an intereſt in having the money, in the firſt inſtance from *Buchanan*, and not being turned round to *Taylor*. *Fink's* ſecurity was not to be leſſened by any after act of *Peterſon's*. *Taylor* was but an organ. His intereſt aroſe from the requeſt of *Peterſon*, and to favour him. *Buchanan* had aſſented to the appropriation of the money. Nothing worſe than indelicacy can be imputed to *Taylor*. His conduct is fair, and for an honeſt purpoſe: the fraud is in *Buchanan* — At all events, the declaration is not for acting as a *Dallas* 139. 1 *T. Rep.* 22, 619. 4 *T. Rep.* 240, 340. 2 *Ves.* 23. 40. 3 *T. Rep.* 681. 2 *Bla. Rep.* 1147, 1269.

1793. judge, in his own cauſe, but for wilfully and oppreſſively iſſuing an execution for a debt ſatisfied. The debt was not ſatisfied, for it was due to *Fink*; and there is no oppreſſion, but an honeſt adminiſtration of juſtice.

The jury found for the defendant.

PENNSYLVANIA *v.* JOHN BELL.

JOHN BELL was indicted for the murder of *James Chalfant*, by ſtriking him with a ſtake on the head.

The priſoner and the deceaſed, with ſeveral others, were at a *huſking frolick*, at the houſe of a neighbour, on the day laid in the indictment; and, as uſual in ſuch caſes, drank freely. *Chalfant*, who was a joking, and, when he drank, a talkative man, frequently excited laughter at *Bell*, who was a man of weak mind, by alluding to ſome previous tranſaction, the pulling of the cape off *Bell's* coat, in helping him on, or, as *Bell* thought, pulling him off a horſe when he was drunk. As often as *Chalfant* metioned the cape of *Bell's* coat, *Bell* became, as it were, mad with paſſion, wanted *Chalfant* to fight with him, provoked him to do ſo, "or clear him of the law." *Chalfant*, who was a great deal ſtouter than *Bell*, ſeemed to have no diſpoſition to fight, but only to make ſport; and by his declining to fight, and by the interference of the company, *Bell's* paſſion ſubſided, and his good humour was reſtored, till again provoked by *Chalfant's* mentioning the cape of his coat.—After ſupper, while a woman of the company was ſinging a ſong, *Chalfant* ſaid, that was juſt like *Bell's* coat. *Bell* flew into a paſſion, came to *Chalfant*, took him by the hand, ſaid, "Damn you, if you be a man, come out and fight me;" and ſeemed to draw him up from his ſeat. As *Chalfant* roſe to go out with *Bell*, a woman who had been ſitting on his knee, ſaid, "You are not going to ſtrike *Bell* ſurely." "No," ſaid he, "I would not for fifty pounds." As they came near the door, *Bell* ſtepped out haſtily before *Chalfant*, and, as *Chalfant* bent his head going out of the door, his head

and one foot being outſide, and one foot yet within, *Bell* ſtruck him with a ſtake on his head. *Chalfant* fell. *Bell* dropped the ſtake and run off. They called after him, to come back, he had killed the man, he anſwered, "No, damn him, he is not dead yet, and if he be, he cleared me of the law; and I will give as much to any man, who takes his part." *Bell* was purſued, but he eſcaped and abſconded. He was apprehended ſome time after. The ſtake had been taken from a ſmall pen in the yard. *Bell* ſome time before he called out *Chalfant*, had gone out to make water, and was near the place, whence the ſtake was taken. But, before and after that, they ſeemed to be on good terms, and *Bell* did not become angry again, till *Chalfant* again mentioned *the cape of his coat.* The ſtake was produced at the trial, a ſtout elm ſtick, likely to kill. *Chalfant's* ſcull was broken, and he died ſoon after. There was evidence given, that, ſeveral months before, in conſequence of a former provocation, *Bell* had ſaid, that he would knock down *Chalfant* with the firſt thing he laid his hands upon. But there was alſo evidence of a reconciliation. At the time the blow was given, an axe and a hoe were lying in the yard. 1793.

Bradford, for the Commonwealth, read the definitions of murder and of malice, and ſtated that the teſtimony amounted to murder. 4 *Comm.* 194 & *Foſter* 256.

Brackenridge and *Roſs*, argued for the defendant. This is not murder: but, we admit, it is manſlaughter. The criterion is whether the killing has proceeded from a heart regardleſs of ſocial duty, and fatally bent upon miſchief. The boundaries between murder and manſlaughter are ſcarce conceivable, and the diſtinction, according to circumſtances, is nice; and judges differ in opinion on the ſame circumſtances. Murder is a deliberate premeditated killing. Manſlaughter is a ſudden killing, on provocation. There are many caſes, in which it has been ſolemnly determined, that killing on provocation, not greater than the provocation in this caſe, amounts only to manſlaughter. In the caſe of *Stedman*, a ſoldier, who had given the firſt provocation, and killed a woman, as ſhe fled from him, by ſtabbing her in the back with his ſword, it was held clearly to be no more than manſlaughter. In the caſe of *Reaſon* and *Foſter* 255-7. *Foſter* 292. 1 *Str.* 499.

1793. *Franter*, for killing a man, by both falling on him, and ſtabbing him in nine places, while he lay on the ground, begging for mercy, and unable to reſiſt them; it was held and found to be but manſlaughter, though the jury was diſpoſed to hang them for the barbarity of
5 *Burr.* 2793. the fact. In the caſe of *Taylor*, a ſoldier, for killing a man, by ſtabbing him with his ſword; though *Taylor* had previouſly uſed words, which ſignified a diſregard of ſocial duty, and a diſpoſition to kill, yet, by reaſon of the provocation, it was held to be but manſlaughter.—
12 *Co.* 87. While ſeveral perſons were playing at bowls, two of them fell out, and quarrelled the one with another; and a third man of them, who had not any quarrel, in revenge of his friend, ſtruck the other with a bowl, of which blow he died. This was held but manſlaughter, becauſe it happened on a ſudden motion, in revenge of
12 *Co.* 87. his friend. Two boys fighting together, one of them was ſcratched in the face, and run three quarters of a mile to his father, who went three quarters of a mile to where the other boy was, and killed him with a blow on the head. Yet, though this blow was given with a cudgel, to a boy, by a man, after going three quarters of a mile, and the provocation was not to himſelf, nor in his preſence; on account of the provocation, it was held
1 *Hale* 455-6. but manſlaughter. If one joſtle another, or whip the horſe of another, and the other, on this provocation, kill
1 *Hale* 456. him, it is but manſlaughter. If a man, uſing provoking words to another, receives a blow from this other, and returns it, and is then killed by the other, it is but man-
1 *Hawk.* 124—5. *Foſter*, 295. ſlaughter. So if a man, provoked by inſulting words, does not attack the inſulter, till he has put himſelf on his guard, and then, in fighting with him, kill him, it is but
2 *Str.* 766. manſlaughter. In the caſe of *Oneby*, there was expreſs malice. Here there is none. You will not preſume it,
1 *Hawk.* 124. 1 *Hale* 452. from any thing that happened before. If two men, who have formerly fought on malice, are afterwards reconciled, and fight again, on a freſh quarrel, it will not be preſumed, that they were moved by the old grudge, unleſs it appear by the whole circumſtances of the fact.

We admit, that, if *Bell* had previouſly prepared this ſtake or cudgel, to beat *Chalfant*, as has been ſuggeſted, this caſe would have been murder. But this is not proved, and you will not preſume it. When *Bell* went out, at the

time when it is ſuggeſted that he took the ſtake from the fence, he was reconciled to *Chalfant*. He did not, as, if he had retained malice, and provided the ſtake for an evil purpoſe, he would have done, quarrel with *Chalfant*, immediately after he came in; but continued at peace with him, till *Chalfant* again provoked him. Where was the uſe of providing a ſtake, when an axe, a hoe, &c. were lying at the door? The ſtake was not prepared before-hand, but ſuddenly offering itſelf to him, in the fury of his mind, he ſeiſed it, as a weapon, with which to combat againſt ſuperior ſtrength, and, in rage, not malice, with it killed *Chalfant*. Even in verdicts, courts will not ſupply a want of finding by the jury; much leſs will juries, by preſumption, ſupply a want of evidence. All your preſumptions will be in favour of innocence. If, on ſpecial verdicts, when it has been doubted, whether the facts amounted to murder or to manſlaughter, courts have given judgment only for manſlaughter, much more will juries, when the caſe appears doubtful, acquit of murder, though they ſhould be fined for it by judges. In the caſe of *Currie*, in this county, the jury acquitted him, contrary to the expreſs opinion of the two judges of the Supreme court who tried him. The reaſon is, juries judge from their hearts, courts from their heads; juries from their feelings, the unaſſiſted dictates of nature, courts from an artificial ſyſtem. 1793.

2 *Str.* 1015.

Kel. 59–62.

Kel. 50.

2 *Hale* 159.

We ſay, then, this is but manſlaughter. It is not a deliberate premeditated killing, but a ſudden killing on provocation. Provocation by words excuſes, unleſs there be a manifeſt intention to kill. Provocation by blows excuſes, though there be an intention to kill. Words are ſometimes a more ſevere provocation than blows. A man's feelings are according to the ſenſibility of his nerves, as well as the impreſſing force; and if a *furor* is raiſed, immaterial from what cauſe, this *furor* excuſes.

It is evident, there was a *furor*, when this weak man ſo repeatedly offered to match himſelf in equal conduct againſt the ſtrength of *Chalfant*. Yet *Chalfant* coolly and cruelly perſiſted in provoking him. When *Bell* loſt all regard for his own life, and was ready, by combating with *Chalfant*, as it were, to run againſt a ſword; how can you ſuppoſe, that he ſhould regard the life of *Chalfant* who provoked him. In the fury of his mind, the

1793. ſtake fell in his way, and under an apprehenſion of an attack from ſuperior force, he ſeiſed it, to reſiſt and repel the approaching danger. If (ſaid Mr. *Brackenridge*) *Chalfant* himſelf, on the bed of death, could have looked back on the tranſaction, conſcious of his being the cauſe, he would have excuſed the priſoner, and, to have mercy himſelf with God, he would have called for mercy to *Bell*. If his ſpirit were in this jury-box, and I were pleading this cauſe to that ſpirit, it would ſay acquit him.

PRESIDENT. Society is inſtituted for mutual protection. It is true, that taking away the life of a murderer makes no compenſation, but its example acts by way of terror, to preſerve the lives of others. In all, or almoſt all nations, blood has been demanded for blood.

The laws muſt operate by certain rules, not the caſual feelings of jurors; and jurors muſt judge of the facts, according to the certain rules of law. For miſerable would be our ſituation, if our lives depended not on fixed rules, but on the feelings, which might happen to be excited in the jurors who were to try us. If, in the caſe of one man, compaſſion pervert the conſtruction of the law, to acquit; in the caſe of another, reſentment may pervert it, to condemn: and whenever guilt may thus eſcape from puniſhment; innocence may be no longer a ſhield. I therefore know no argument leſs proper or more dangerous, or to which juries ought to liſten with greater ſuſpicion and averſion, than that which muſt derive its force from confounding the authority of a court and a jury, inſtilling into the one a prejudice againſt the opinion of the other, and perſuading jurors that they are at liberty to apply to facts a rule of their own, different from that which the law applies. The court is the mouth of the law. Whether the facts are ſo, or ſo, it lies with you to determine, according as you believe the teſtimony. Suppoſing them ſo or ſo; whether they amount to murder or manſlaughter, is a queſtion of law, for the court to determine. You may find, according as you believe or diſbelieve the facts, and comparing the facts with the rules of law, that the priſoner is guilty, or not guilty, or guilty of manſlaughter; or you may find the facts ſpecially, without drawing any concluſion of guilt or innocence; leaving it to the court, to pronounce the conſtruction

which the law puts on the facts found; but you cannot, but at the peril of violation of duty, believing the facts, ſay that they are not what the law declares them to be: for this would be taking upon you, to make the law, which is, the province of the legiſlature; or to conſtrue the law, which is the province of the court. 1793.

All killing is not murder; but if there be an unlawful killing, the law will preſume it to be murder, unleſs the killer can ſhew, that it is not.

Murder is killing with malice. Any formed deſign of miſchief may be called malice. Malice is a deliberate, wicked vindictive temper, regardleſs of ſocial duty, and bent on miſchief. This may be collected from previous circumſtances, or circumſtances attending the manner or fact of the killing. There may be malice, in its legal ſenſe, when there is no actual intention of any miſchief, but the killing is the natural conſequence of a careleſs action, as riding a horſe, or driving a carriage, through a crowd. Manſlaughter is a ſudden unlawful killing, without the circumſtances of malice, cruelty, revenge, &c. involved in the technical word *malice*. 1 *Hawk.* 121. 2. *Foſter* 256 —7. 2 *L. Ray* 1487. 1 *Hawk.* 113, 130. 1 *Hale* 476. *Foſter* 262-3.

Madneſs excuſes from puniſhment of every kind, for any crime whatſoever. Anger, a ſhort madneſs, when provoked by a reaſonable cauſe, excuſes from the puniſhment of murder.

You will not preſume, that a killing exiſted, unleſs it be proved. But if a killing has been proved, you muſt preſume, for the law preſumes, malice, unleſs the killer ſhew, that he did it in a paſſion reaſonably provoked. Whether paſſion or provocation, the priſoner muſt prove, they are never preſumed, but malice, the contrary of them is preſumed; and if he prove them not, you will preſume malice, not any particular fact, or circumſtance of malice, but malice in general. Nor is this preſuming againſt innocence: for the killing being proved, a thing wicked in itſelf, it becomes neceſſary for the killer to ſhew a juſtification or excuſe for it. Man is a free agent; and if he do an act evil in itſelf, it will be preſumed to ariſe from an evil intention, till the contrary appear: for a man muſt be preſumed to intend what he accompliſhes. 2 *Hale* 60, 157-9. 1 *Hawk.* 124. *Kel.* 112. 2 *L. Ray* 1493-4.

Caſes of ſpecial verdicts are not applicable to this.—

1793. Courts cannot decide facts, and, if juries do not find them, courts cannot presume them. But courts will presume malice from facts in the manner of killing: for that is a construction of law.

Holloway's case, Cro Car. 131. Kel. 127.

4 Com Di. 15, 18. 2 L. Ray 1488-96. 2 Str. 766-74. Foster 296, 315. 1 Hale 455. 1 Hawk. 124-5.

To exclude the presumption of malice, and, of course, to reduce the killing below the degree of murder, on the ground of passion, there must be both passion and provocation. Passion without provocation, or provocation without passion, is not sufficient. There must not only be both passion and provocation, but the provocation must be sufficient. For it is not to be supposed, that a rational man will, without reasonable provocation, suffer himself to be so far transported by passion, as to take away life; and it would be difficult to distinguish between a real passion, and a passion affected as a cloak for malice, if the law indulged passion without reasonable provocation.

Foster 296, 4. Com. Di 15. 1 Hawk. 123.

Deliberate killing, without *passion*, whatever may have been the *provocation*, is murder. For, if the killer was cool, and master of his passion, and had the full exercise of his judgment, the principle of responsibility thus remaining, he must suffer the full effect of his conduct.

What is reasonable or sufficient provocation is a fixed question of law, not variable, according to the degree of judgment or irritability of the killer. This, being of a nature not easily, if at all, to be ascertained, would be too precarious a standard to appeal to. And the law proceeds on the surer ground of established rules.

5 Burr. 2796. Foster 296.

An attack, though slight, on the person, or a violation of the bed of another, from the high value, which the law sets on these objects, is a sufficient provocation, to extenuate a sudden killing in the heat of passion, and make it no more than manslaughter. It would be so, also, I think, if the personal attack were only menaced, but immediately approaching, and if under the terror, and in defence of that, an homicide were committed: for it has even been said, though this seems laying it down much too loosely, that words of *menace* of bodily harm would come within the reason of such provocation, as would make the offence but manslaughter. An attack on the person and safety of a friend is a provocation sufficient to extenuate to manslaughter a sudden killing, in the

1 Hawk. 108.

1 Hale 456.

12 Co. 87.

peril and defence of this friend. If a maſter, provoked by negligence or improper conduct of a ſervant; or if one man, provoked by contumelious or reproachful words or geſtures of another; proceed to chaſtiſe the offender, with a weapon, and in a manner proper for chaſtiſement, and not likely to kill; and an accidental killing of the offender enſues; the provocation is ſufficient to make this killing but manſlaughter. So, if, in ſuch moderate and reaſonable chaſtiſing, blows are exchanged, or if, on ſuch affront, the parties proceed to combat, on equal terms, and he who gives the firſt blow kills the other in the encounter, there being no original malice in the killer, it is but manſlaughter. But, farther than this, the law does not excuſe, for if, on any ſlight provocation of words or geſtures of contumely or inſult, the paſſion of the inſulted perſon ſhew itſelf in circumſtances of unuſual cruelty, tranſport beyond the juſt meaſure of correction, and revenge itſelf with a weapon, or in a manner, likely to kill, and do kill the perſon provoking him, it is murder. For it is ſettled, that no words or geſtures, however contumelious, are a ſufficient provocation, to extenuate ſuch a killing, and make it only manſlaughter. The law has never ſet ſo low a value on the life of man, as to ſay, that words are ſuch a provocation, as, if the offended perſon ſtrike with a weapon, or in a manner, likely to kill, and do kill, it will be but manſlaughter. Such killing has always been held murder. For the law will not ſuffer, with impunity, a man to become ſo angry, for mere words or geſtures of contumely, as, in his rage, to kill a man. It is a fixed principle, that, if from the weapon, or the manner of ſtriking, an intention to kill may or muſt be collected, provocation by words only is not ſufficient to make the killing but manſlaughter: malice, a deſign of miſchief, will be preſumed, and the killing will be murder. I conſider this as an eſtabliſhed boundary, which the law ſets to human paſſion; and I hold it dangerous to remove it. There would be no freedom of cenſure or irony, if you muſt, at the peril of your life, firſt meaſure the degree of another's patience. The law then ſays, while you touch not the perſon of another, death ſhall avenge the taking away of your life. When

1793.

Foſt. 295. *Kel.* 64-5. 1 *Rev.* 144. 1 *Hawk.* 135-5 1 *Hawk.* c. 31. §. 6. *Kel.* 12-30-1

Foſter 291. *Co. Pl.* 57-8. *L. Ray.* 144. 1 *Hale* 455. 1 *Hawk.* 124

4 *Com. Dig.* 15 *Com. Rep.* 15. *Kel.* 131. 55. 60, 65.

5 *Farr.* 2706

1 *Hale* 455.

1793. you assault the person of another, you shall risk your own. Abstain from violence, and the law guards you. If you employ violence, you must hazard its being employed against you. I consider this as proper to preserve peace and safety, and to put the weak in a state of defence and equality with the strong.

Such is the law, and consistent with these principles are all the cases.

Kel. 131. There is a case, which, at first sight, might seem to contradict this. *Williams*, a *Welchman*, on *St. David's* day, having a leek in his hat, a certain person pointed to a *Jack* of *Lent*, that hung up hard by, and said to him, look on your countryman; at which *Williams* was much enraged, and took a hammer, that lay on a stall hard by, and flung at him, but missing him, it hit another, and killed him. It was held, that he was guilty
— 132. of manslaughter. But lord *Holt* observes, when he cites this case in *Mawgridge's* case, that the indictment being only for manslaughter, he could not, on it, be found guilty of murder: "but," adds he, "if the indictment had been for murder, I do think, that the *Welchman* ought to have been convicted thereof; for the provocation did not amount to that degree, to excite him designedly to destroy the person who gave it to him."

12 *Co.* 87. In the case of the killing at the bowls, it was while the deceased was fighting with the friend of the killer: his friend was attacked and in danger. In *Rowley's* case,
Cro. Ja. 296. the killing is expressly said, by *Croke*, to have been occasioned by a *small* cudgel; and thus, though death accidentally ensued, the chastisement may not have exceeded the natural measure, from the *angry* father of a
Foster 292. *bleeding* son. In *Stedman's* case, the woman had struck the soldier, in the face, with a patten, and drew a good deal of blood. This was held to be sufficient provoca-
1 *Str.* 499. tion. In *Reason* and *Franter's* case, there was ground to believe, that there was an attempt to rescue. The
Foster 292-4. deceased had brought down his pistols, and gave the first blow, accompanied with menaces to the officers. A pistol was heard to go off; both his pistols were discharged in the affray; and his sword was found drawn and broken. *Reason* and *Franter* were both wounded,
5 *Burr.* 2795. and one of them with a pistol shot. In the case of *Taylor*, he was provoked by opprobrious words. The first blow

which he gave, on this provocation, was with a ſmall rattan cane, not bigger than a man's little finger. And it was not, till after he had been collared, thrown down againſt a ſettle, ſhoved out of the room, and violently puſhed out of the door, that he gave the wound with the ſword. In *Mawgridge's* caſe, and in *Oneby's* caſe, the words of provocation came firſt from the perſons killing, the firſt blows were given by them, and that being done in a manner that ſhewed malice, the killing, though after they had received wounds from the perſons whom they attacked, was held to be murder. 1793. *Kel.* 119. *L. Ray.* 1485. *Str.* 766.

In the caſe before us, two things are well conceded; —1. That the killing of *Chalfant* by *Bell* is, at the leaſt, manſlaughter;—2. That, if the cudgel or ſtake was previouſly prepared, it is murder. It is not doubted the killing was by the priſoner, and with the cudgel or ſtake, which has been produced before you. Nor is it denied, that if it were poſſible to preſume, that the killing was on the old grudge, it would be murder.— But it is ſaid this cannot be preſumed. 1 *Hawk.* 124.

Though the court will not preſume this, unleſs the jury find it; yet, if the circumſtances of the caſe, lead ſtrongly enough to this preſumption, the jury may find ſo. The circumſtances of this caſe do not ſeem to lead ſtrongly to this preſumption. I alſo think the proof of previouſly preparing the ſtake is very light. You will however weigh thoſe things, taking into view alſo the facility with which he could have ſeiſed the other weapons, the axe, &c. and the manner and purpoſe of applying either. 1 *Hale* 452. *Cro. Ja.* 296.

But I put it on this point. No provocation, but words, has been proved. And the law does not conſider words as ſuch a provocation, as can excite a paſſion, in which, if a man ſtrike another, with a weapon likely to kill, and thereby kill, the offence will be extenuated to manſlaughter. When the provocation is only by words, ſuch killing, notwithſtanding the paſſion, is murder. This appears to have been ſuch a killing. The ſtroke was given with a weapon likely to kill, inſidiouſly, before the deceaſed was on his guard; and the killing is murder.

The jury found him guilty of murder.

1793. On *Saturday*, 28th *December*, 1793, *Brackenridge* and *Roſs*, moved in arreſt of judgment, on the following grounds:—

Act. v. § 5. The preſent conſtitution, of this ſtate, for the firſt time, gave authority in capital offences, to the judges of the county courts, the preſident being one. The conſtitution is in the nature of a commiſſion, and rendering the preſence of the preſident neceſſary, it ought to be ſhewn, that he was preſent. The caption of this indictment does not ſet forth this. Its caption is only, "at a court of Oyer and Terminer and Gaol Delivery, for the county of *Waſhington*," does not ſay before whom, nor that the preſident was one. It does not ſay, that the town of *Waſhington* is in the county of *Waſhington*. The court is not to go on their own knowledge. The record itſelf muſt ſhew to all poſterity, and when memory is gone, that this proceeding was regular. In the *Foſter* 1, 7. caſe of the ſpecial commiſſion, for the trial of the perſons concerned in the rebellion of 1745, the proceedings were very minutely attended to, and the defects pointed out in this, did not exiſt in the indictments before that court.

2 *Hawk.* 3, 9. The caption of an indictment muſt ſet out the court, the jurors, &c. that the authority may appear.

This indictment concludes "againſt the act of Aſſembly." There is no act of aſſembly againſt murder.

The offence is not laid with ſufficient certainty and conſiſtency. It is ſtated, *that of this mortal wound Chalfant, from the ſaid 14th day of November did languiſh, and languiſhing did live, and on which ſaid 14th day of November, of the ſaid mortal wound, died.*

Theſe objections may be thought nice, and they touch not the merits. But the priſoner's life is at ſtake. And, in ſuch caſe, the niceſt objections will have weight.

Bradford, for the ſtate. Suppoſe the preſident and other judges had been named, ſtill ſtrangers and poſterity could not know, that theſe were commiſſioned, or that the governor, who commiſſioned them, was governor. The abſurdity is glaring. Could I know, beforehand, what aſſociate judges would attend? The conſtitution declares, that there cannot be a court of Oyer and Terminer without the preſident. The caption of this indictment is, at a court of Oyer and Terminer. Therefore the preſident muſt have been preſent.

The indictment concludes alſo "againſt the peace and dignity of the commonwealth of Pennſylvania.— The words *againſt the form of the act of aſſembly* may be rejected as ſurpluſage. 1793.

The court adjourned to 6*th January*, 1794, when their opinion was delivered.

PRESIDENT. *John Bell* having been committed to the gaol of this county, on a charge of killing *James Chalfant*, a precept was iſſued on 21ſt *November*, 1793, by me, as preſident of the court of Common Pleas of this county, and *James Edgar*, and *Matthew Ritchie*, judges of the ſaid court, and juſtices, the preſident being one, of Oyer and Terminer and Gaol Delivery, within this county, directing the ſheriff, to have the priſoners in the ſaid gaol, and a competent grand jury, and traverſe jury, of the ſaid county, for their trial before us, or any two of us, the preſident being one, at the court houſe in the town of *Waſhington* on the 23d day of *December* then next following. *Foſter* 1—7.

On the 23d *December*, the above named preſident and judges, and the two other judges, met at the court houſe, and a court of Oyer and Terminer and Gaol Delivery for the county of *Waſhington* was held. The ſheriff returned the above precept, with a pannel of twenty-four grand jurors, as he had been directed. Of theſe ſeventeen appeared, and (*Iſaac Leet* being foreman) were ſworn as the grand jury for thoſe courts.

To this grand jury a bill was ſent up in the following words:

"*Waſhington County, ſſ.* } At a court of Oyer and Terminer and general Gaol Delivery for the county of *Waſhington*, held, in the town of *Waſhington*, on the twenty-third day of *December*, in the year of our Lord, one thouſand ſeven hundred and ninety-three. The grand inqueſt that now is for the body of the county of *Waſhington*, upon their ſolemn oath and affirmation, reſpectively, do preſent, that *John Bell* late of the county of *Waſhington*, yeoman, not having the fear of God before his eyes, but being moved and ſeduced by the inſtigation of the Devil, on the fourteenth day of *November*, in the year of our Lord, one thouſand ſeven hundred and ninety-three, with force and

1793. arms, at the county of *Waſhington* aforeſaid, in and upon one *James Chalfant*, in the peace of God, and the commonwealth of *Pennſylvania*, then and there being, feloniouſly, wilfully, and of his malice aforethought, did make an aſſault; and that the ſaid *John Bell* with a wooden ſtake, in length four feet, and in thickneſs three inches in diameter, which he the ſaid *John Bell* in both hands then and there had and held, the ſaid *James Chalfant* then and there feloniouſly, wilfully, and of his malice aforethought, did ſtrike, giving to the ſaid *James Chalfant* then and there, with the ſtake aforeſaid, in and upon the left ſide of the head of the ſaid *James Chalfant*, one mortal wound of the breadth of three inches, and the depth of two inches, *of which mortal wound aforeſaid the ſaid James Chalfant, from the ſaid fourteenth day of November, in the year aforeſaid, at the county aforeſaid, did languiſh, and languiſhing did live*, on which ſaid fourteenth day of *November*, in the year aforeſaid, the ſaid *James Chalfant*, at the county of *Waſhington* aforeſaid, of the ſaid mortal wound died. And ſo the jurors aforeſaid, upon their oath aforeſaid, do ſay, that the ſaid *John Bell*, in the manner and form aforeſaid, feloniouſly, wilfully, and of his malice aforethought, did kill and murder the ſaid *James Chalfant againſt the act of aſſembly, in ſuch caſe made and provided*, and againſt the peace and dignity of the commonwealth of *Pennſylvania*, &c.—*Jared Ingerſoll*, attorney general."

This bill the grand jury indorſed, "A true bill," with the name of the foreman ſubſcribed to the indorſement; and ſo returned it.

Being arraigned on this indictment, *John Bell*, pleaded, that he was not guilty. The attorney for the ſtate joined iſſue. The iſſue was tried, in the ſame court by a traverſe jury duly returned by the ſheriff, on the above precept: and this traverſe jury found, that *John Bell* is guilty, in manner and form, as he was indicted.

Being demanded, at the ſame court, what he had to ſay, why judgment ſhould not be paſſed on the finding of the jury, his counſel urged, in arreſt of judgment, the following objections to the indictment.

2 *Hard.* 359, &c. *Foſter*, 1, &c. *Conſt. v.* 5. That the caption of this indictment is defective and erroneous, not ſtating the judges before whom it was

taken, nor that the preſident was one, nor that the town of *Waſhington*, *in* which the court was held, is within the county of *Waſhington*, *for* which the court was held, and the jury ſummoned. 1793.

That the body of this indictment is uncertain, repugnant, and void, alledging the aſſault and the ſtroke, on the 14th day of *November*, and ſtating, that, *from* the ſaid 14th day of *November*, *Chalfant* languiſhed and lived, and that *on* the ſaid 14th day of *November* he died. If he languiſhed and lived *from* the 14th day of *November*, he muſt have been alive after that day, and yet the indictment ſtates him to have died on it. This is conſidered as a repugnancy which makes it erroneous.

That the concluſion of this indictment is alſo erroneous, ſtating the murder to be *againſt the act of aſſembly in ſuch caſe made and provided*, when there is no act of aſſembly againſt murder.

For theſe reaſons, the counſel for *John Bell* have moved, that judgment on this indictment and verdict be arreſted; and this, it is ſaid, will occaſion no failure of juſtice, as he may again be tried on another and ſufficient indictment.

In diſcuſſing theſe reaſons, I ſhall invert the order of them, and beginning with the laſt, proceed backwards to the firſt, on which the chief ſtreſs ſeemed to be laid.

But let me premiſe, that, although courts have uſually, in all capital caſes, given way to very nice objections, it appears to me, that this inclination ought rather to be reſtrained than extended. I cannot but believe, that yielding to frivolous or formal objections, no way affecting the innocence or defence of an accuſed perſon, ſeems better calculated to reduce the law to a game of addreſs, than to promote juſtice. And I am led to wiſh, that all exceptions to the form of the previous proceedings ſhould be made before a trial of the merits, and that a defence on the merits ſhould be conſidered as an admiſſion of previous regularity, againſt which no objections ſhould be afterwards received.

Two great men, at the difference of a century from each other, ſeem to have felt the ſame impreſſions; and if they were not led to the ſame concluſion, which I have ſtated, they have, at leaſt, expreſſed themſelves in ſtronger terms.

1793. Lord *Hale*, whoſe diſpoſition of tempering juſtice with mercy will not be diſputed, thus delivers his opi-
2 *Hale P. C.* 193. nion. "In favour of life, great ſtrictneſſes have been, in all times, required, in points of indictments; and the truth is, that it is grown to be a blemiſh and inconvenience in the law, and the adminiſtration thereof. More offenders eſcape, by the over-eaſy ear given to exceptions in indictments, than by their own innocence; and, many times, groſs murders, burglaries, robberies, and other heinous and crying offences, eſcape by theſe unſeemly niceties, to the reproach of the law, to the ſhame of government, and to the diſhonour of God. And it were very fit, that, by ſome law, this overgrown curioſity and nicety were reformed, which is now become the diſeaſe of the law, and will, I fear, in time grow mortal, without ſome timely remedy."

Lord *Mansfield*, from whoſe notice few corruptions eſcaped, expreſſes, more obliquely, ſimilar ſentiments, and
4 *Burr.* 2082. points out their true limits. "*Tenderneſs* ought always to prevail, in *criminal* caſes, ſo far at leaſt, as to take care, that a man may not ſuffer *otherwiſe than by due courſe of law*; nor have any hardſhip done him, or ſeverity exerciſed upon him, where the conſtruction may admit of a reaſonable doubt or difficulty. But tenderneſs does not require ſuch a conſtruction of words (perhaps not abſolutely clear and expreſs) as would tend to render the law nugatory and ineffectual, and deſtroy or evade the very end and intention of it: nor does it require of us, that we ſhould give into ſuch nice and ſtrained critical objections, as are contrary to the true meaning and ſpirit of it."

Theſe ſentiments appear rational and ſolid, and ſeem to lead ſtrongly to the concluſion, which I have ſtated. But whatever my opinion or inclination may be, as to the ſtate to which the law ought to be brought, if there be in it any fixed principle, which will render all, or any of theſe objections fatal to this indictment, it muſt fall: for, ſurely, a man's life ought not to depend on unpubliſhed, or unwarranted opinions, but on ſettled and acknowledged rules.

With theſe impreſſions, I proceed to examine the preceding reaſons in arreſt of judgment.

1. It is urged, that the concluſion of this indictment,

alledging the offence to be *against the act of assembly in such case made and provided*, when there is no act of assembly prohibiting it, is erroneous, and vitiates the whole. 1793.

How these words came to be introduced into this indictment, I do not know: I see no use for them. But what harm they can do, more than any other superfluous words, I am equally at a loss to explain. Strike them out, and the conclusion of this indictment is good. If it be good without them, they are within the rule, that surplusage words do not vitiate. *Co. Lit.* 303 *b.*

So would I say, on principle, were there no precedents to warrant me. But, however it may have been doubted, or doubtfully spoken of, I think it settled, that an indictment for an offence at common law is not vitiated by a conclusion against the form of the statute; for, if an offence at common law is prohibited by statute, this takes not away the indictment at common law. The statute is cumulative; and if an indictment for such offence conclude against the statute, though the offence be not made out against the statute, judgment may be given at common law. Is there any reason, why the rule should not be the same, when there is no statute against the offence, as when there is no offence against the statute? Murder is an offence at common law, and rejecting the words "*against the form of the act of assembly, in such case made and provided*," the conclusion of this indictment, as an indictment at common law, is right. 2 *Hawk.* 356. 2 *L. Ray.* 1164, 1163. *Salk* 376. *Doug.* 441-5. 1 *T. Rep.* 121. 1 *Ventr.* 103. *Salk* 212.

2. The second objection to this indictment is, that it alledges the offence uncertainly and repugnantly, and is therefore erroneous: for, *in legal terms*, it says, that *James Chalfant* was alive, after the 14th day of *November*, and says also, that he died on the same 14th day of *November*.

Both these allegations cannot be true. And it is laid down as a rule, that, where one material part of an indictment is repugnant to another, the whole is void; for the law will not admit such nonsense and absurdities in legal proceedings, which, if suffered, would soon introduce barbarism and confusion. 2 *Hawk.* 325. *Cro. El.* 196.

Now, in an indictment for murder, it is material to alledge both the day of the stroke, and the day of the 2 *Hawk.* 263.

1793. death; that it may appear that the death was within the year and day after the ſtroke; for, beyond that time, the law preſumes not the ſtroke to be the cauſe of the death. The allegation of both being therefore neceſſary, if either be alledged on an impoſſible day, as the 31ſt of *June*, or if the murder be alledged to have been on a day different from the day on which the death is alledged to have been, though on the day on which the ſtroke was given, as if the jury find the ſtroke given on the 1ſt, and the death on the 10th of *June*, and ſo conclude that he murdered him on the 1ſt of *June*, when it appears from the indictment, that he was alive: this is repugnant and void: for though the ſtroke in fact killed him, yet, till the death, it was but a treſpaſs, and is not to be made a felony by relation.

1 *Bolſt.* 203. *Hughes' abr.* 1084, 1094. *Cro. El.* 738, 739, 196. 4 *Co.* 41. 2.

Whether this indictment lays the death on a day, *on* and *after* which *Chalfant* is ſhewn by the ſame indictment, to have been alive, and whether, therefore, the indictment be repugnant and void, depends on the conſtruction to be put on the words "*from the ſaid 14th day of November languiſhing did live*," and on their importance in this indictment. In fiction of law, there are no parts of a day, yet the fact is otherwiſe, and, wherever it is material or proper, may be averred. Thus it might have been ſtated here, that the ſtroke was given at one of the clock, on the 14th day of *November*, and that of that ſtroke *Chalfant* languiſhed, and languiſhing did live, till ſix of the clock on the ſame day, and, at ſix of the clock on the ſame day, he died of it.

3 *Burr.* 1431. 1 *T. Rep.* 116-8.

Before it can be admitted, that this indictment ſhews, that *Chalfant* was alive after the 14th day of *November*, it muſt be eſtabliſhed, that *from* the day of the ſtroke, is *excluſive* of the day of the ſtroke; or, in other words, muſt mean ſometime *after* it. If this be its neceſſary meaning, and the averment, that, after the ſtroke, he lived languiſhing, be a material part of the indictment, the principles already laid down muſt deſtroy it.

But, though *from* the day may be properly or uſually, and was long conſidered as certainly equivalent to *immediately after*, it ſeems now, according to the ſubject, to admit of a different conſtruction, and ſometimes to *include*, ſometimes to *exclude* the day mentioned.

Co. Lit. 46. *b.* 1 *Wils.* 176. 2 *Wils.* 168. *Cowp.* 714.

Theſe words expreſs their meaning very awkwardly,

but ſtill not doubtfully. The whole taken together is, 1793.
that *Chalfant* lived ſometime after the ſtroke, but died on the day on which it was given.

But are they a material part of this indictment? I think not; and I think them as uſeleſs as they are awkward. It is material to aver, that the ſtroke was given on a certain day; it is material to aver, that, on a certain day, the perſon ſtricken died of this ſtroke; but what paſſed between the ſtroke and the death, it is not material to aver: The averment of the ſtroke, of the death, and of the time of each, ſhewing the death to be within the year and day after the ſtroke, with the averment that the ſtroke occaſioned the death, completely aſcertains the homicide, and whether the death was inſtant, or the party lived, languiſhing or otherwiſe, after the ſtroke, is no material part of the indictment; a repugnancy in it will not vitiate an indictment otherwiſe good; and it may be ſtruck out, without, in the leaſt, altering the nature of the accuſation. 1 *Hawk.* 119. 1 *Hale* 428. *Rew's caſe, Kel.* 26.

If it be ſtruck out, the indictment will ſtate, "*that John Bell, on the* 14*th day of November*, 1793, *with force and arms, at the county of Waſhington, in and upon James Chalfant, feloniouſly, wilfully, and of his malice aforethought, did make an aſſault, and with a wooden ſtake, which he then held in his hands, did, feloniouſly, wilfully, and of his malice aforethought, ſtrike the ſaid James Chalfant; giving to the ſaid James Chalfant, then and there, with the ſtake aforeſaid, in and upon the left ſide of the head of the ſaid James Chalfant, one mortal wound of the breadth of three inches, and the depth of two inches, on which ſaid* 14*th day of November, in the year aforeſaid, the ſaid James Chalfant, at the county of Waſhington aforeſaid, of the ſaid mortal wound died.*"

This is a ſufficient allegation of murder; and, though not ſo elegant, is as preciſe and intelligible, as any ſentence of a *Robertſon*, a *Gibbon*, or a *Junius*: and an indictment will no more be quaſhed, for inelegant *Engliſh*, than for falſe *Latin*. *Cro. El.* 108. 5 *Co.* 122.

On theſe grounds, therefore, I am not at liberty to ſay, that judgment on this verdict ſhall be arreſted; and I proceed to examine the only remaining reaſon urged, and chiefly relied on, for this purpoſe.

3. It is objected to the caption of this indictment,

1793. that it ſtates not the judges, before whom it was taken, and ſo it appears not, that they had authority; for, without the preſident, no court for the trial of murder could be held, by the other judges of the court of Common Pleas; and that it ſtates not that the town of *Waſhington* is *in* the county of *Waſhington*, for which the court was held, and in which the offence was committed.

To this it has been anſwered, that this is requiring too much; for it could not be previouſly known, what judges would attend, and it might be farther required, to prove that they were judges, and that the governor who commiſſioned them, was the governor. It has been farther and better anſwered, that the caption ſtates the indictment to have been taken, at a court of Oyer and Terminer and Gaol Delivery, for the county of *Waſhington*, held in the town of *Waſhington*, and it muſt be preſumed, from the proviſion of the conſtitution, to have been held before the preſident and a competent number of judges, of the court of Common Pleas of that county, or before ſome other judges, forming a competent court of that deſcription, and to have been held within the county, for which it was held.

2 *Hale* 185-6. 3 *Bac.* 105-7. Many averments are neceſſary or proper in an indictment for murder, which yet need not be proved with preciſion. The time of the ſtroke, and of the death, the weapon uſed, and how, and in what part of the body, the ſtroke was given, and the dimenſions of the wound, are all neceſſary or proper to be averred; but if it come out in proof, that the time of the ſtroke, and of the death, was different, or that the ſtroke was with another weapon, or in another manner, or on another part of the body, or that the wound was of other dimenſions; the nature of the offence is not thereby materially altered, a ſufficient charge of murder is made in the indictment, and if ſufficient, though in circumſtances different, evidence of murder be given at the trial, the murderer will be convicted by the jury, and judgment, on this conviction, will be given by the court.

If the judges muſt be named in the caption of an indictment, and, in order to name them there, it were neceſſary to know them before the court, there are two plain rules, without any aid from divination, for naming them ſafely. Thoſe may be named, who ſigned the pre-

cept, or all in commiſſion may be named. And if the preſident and any one other who ſigned the precept attend, it is ſufficient. It is not *proof*, but *averment*, that is looked for in an indictment. The proof comes afterwards. If indeed it appear, on examination, that he, who is ſtated as preſident, is not preſident, as having no commiſſion, or a commiſſion from one who was not governor. The whole proceeding is void. 1793. 2 *Hale* 167.

But to meet the objections directly. It cannot be denied, doubted, or diſſembled, that indictments have been quaſhed in *England*, for reaſons, at leaſt, as light, as thoſe urged againſt this indictment. An indictment was quaſhed, becauſe the grand jury called it an *indictment*, before it was found a *true bill*. *Rex v Brown* 1 *L. Ray* 592. *Salk.* 376.

It is laid down as a general rule, that every caption of an indictment is erroneous, which ſets not forth, with proper certainty, the court, in which, the jurors, by whom, and the time and place, at which, the indictment was found. The caption of an indictment taken at the ſeſſions muſt mention before what juſtices it was taken, and ſet forth the nature of their commiſſion, or it is erroneous, and will be quaſhed; as not ſufficiently ſhewing a competent juriſdiction. 2 *Hawk.* 368. 61. *Cro. El.* 738. 1 *Mod.* 24. *Yelv.* 46.

Indictments have been quaſhed for not naming the jurors, who found them, or ſtating that they were twelve in number, or of the county, or precinct, or that they were honeſt and lawful men, or that they enquired upon oath. 2 *Hawk.* 361. 2 *Hale* 167. *Cro El.* 654. *and. Cro. Ja.* 41.

Indictments have been quaſhed, becauſe the caption ſet forth no place where taken, or ſhewed not with ſufficient certainty, that the place ſet forth is within the juriſdiction of the court, as at a ſeſſions of the peace holden for ſuch a county at *B.* without ſhewing in what county *B.* is, otherwiſe than by putting the county in the margin. 2 *Hawk* 362. *Cro. El.* 137. 606. *Cro. Ja.* 276. 2 *Hale* 166.

If this indictment muſt be examined on theſe principles, it cannot ſtand.

But againſt theſe principles, it may be ſtated, that this indictment appears from the caption to be taken at a court of Oyer and Terminer, and general Gaol Delivery, and it may be aſked whether this, by implication, does not ſufficiently ſtate, that it is taken at a court having authority to take and try indictments for murder. *Conſt. Penn.* v. 4.

1793. Where the caption of an indictment is at a *general sessions* of the peace, it is not necessary to stile any of the justices *of the quorum*, for that is sufficiently shewn, by shewing that the sessions was a general sessions, which could not be held without some of the *quorum*. *A fortiori*, shall this be presumed in a court of Oyer and Terminer, &c. a court of higher nature than the sessions of the peace, and scanned by rules less nice.

2 *Hawk.* 360. 3 *Mod.* 152. 2 *Hale* 167.

Rex v. Boyce 4 *Burr.* 2073-84-6. On an indictment tried at a court of Oyer and Terminer, &c. and removed into the King's Bench, objections, not unlike the present, were there taken and over-ruled; and sentence of death was passed on the defendant. On the authority of this case, the editor of the new edition of *Comyns' Digest*, states, that it is not necessary, that the record should set forth the commission of gaol delivery, or mention the judges' name, or say he was *of the quorum*. If it say the king's justices, it is enough.

3 *Com. Dig.* 534.

4 *Com. Dig.* 59. I shall not here enquire into the authority of justices of the peace in quarter sessions, to take indictments. This case is at a court of Oyer and Terminer, &c. and, besides, my opinion is formed upon other principles.

1 *L. Ray.* 710-1. In all cases of indictments, quashed for reasons such as I have stated, and such as are urged against this indictment, they have, so far as I have been able to discover, been indictments removed out of an *inferior* court into the King's Bench. The judges of the court of King's Bench could know nothing more of the proceedings, than what they could discover on the face of the record sent up, and if, there, they cannot find, or necessarily presume competent jurisdiction and regularity, they have nothing else to which they may resort for further information; and, competent jurisdiction and regularity failing to appear, the indictment must be quashed.

Yelv. 46. *Cro. El.* 489. *Cro. Ja.* 184. 2 *Com. Dig.* 610. And, in the court of King's Bench, it seems to be a principle, by which they are governed in their examination of the proceedings of inferior courts, that, if such proceedings, in setting forth the stile of the inferior court, do not shew their authority, whether by charter, or prescription, and do not shew the names of the judges of such court, they are erroneous: for all jurisdiction rests in the crown, and, therefore, the king's court ought to be informed how the authority is derived; and, with-

out an expreſs ſtatement of the names and authority of the judges in the inferior court, the king's court cannot recognize them. 1793.

There is another principle, which ſeems to have governed deciſions in the court of King's Bench, on indictments taken at ſeſſions of the peace. They have conſidered the authority of juſtices of the peace as of two kinds; that, by one, they acted as mere conſervators of the peace; by the other, they were empowered to hear and determine offences: the firſt made them guardians, the laſt made them judges; but their name *juſtices* did not imply both; and, therefore indictments taken before them as juſtices, without the addition of their authority of trying as judges, were holden to be bad. This will not be wondered at, when writs of *certiorari*, to remove indictments taken before them as juſtices, have been holden to be bad. 2 *Hawk.* 58-9. 359-60. 2 *Hale* 43 4, 166. *Rex v. Carter*, 1 *Str.* 442. 2 *Hawk.* 58-9.

Theſe principles ſeem to furniſh an explanation of all doubts reſpecting this indictment. The indictments, which were quaſhed in the King's Bench in *England*, were quaſhed, not becauſe they were *not* properly taken, but becauſe that court could *not ſee*, that they *were* properly taken. Their principles prevented them from looking beyond the paper ſent up to them, and *it* did not ſhew *all* the truth.

But do we ſtand in this ſituation? I am called on to doubt whether I was preſent at a court, at which I know, that I was preſent. The other judges are called on to doubt, whether any of them were preſent at a court, at which each of them knows, that all were preſent; and both they and I are called on to doubt, whether this court houſe, where we now ſit, be within the county of *Waſhington*. To the common underſtanding of mankind, ſuch doubts muſt appear very chimerical and abſurd.

But, to reſt on the record only, and not look beyond it, but proceed technically; muſt we not take the whole of the record together? Or muſt or can we, when objections are made to a part, wink ſo hard, as not to ſee, or abſolutely ſhut our eyes to the reſt, which would clearly explain, and fully anſwer theſe objections? It is impoſſible, that we ſhould be compelled to look only to ſee errors, and ſhut our eyes againſt the cure of thoſe

1793. errors, when both error and cure appear on the *whole* of the proceedings. In examining this indictment, therefore, we muſt, together with the indictment, take into view, the precept iſſued for holding this court, the return of jurors made by the ſheriff to this court, the minutes taken, by the clerk, of the ſeſſions and proceedings of this court, the names of the grand jury ſworn to preſent, and the traverſe jury ſworn to try, this bill of indictment. Theſe general records are part of each particular record, and will be annexed to each, as occaſion requires. Annexing them, therefore, to the record of this indictment, it will appear, that it was taken at a court of Oyer and Terminer and general Gaol Delivery, held by *Alexander Addiſon*, preſident, and his aſſociates, juſtices, aſſigned to hear and determine all offences within this county, and deliver the gaol of this county of all priſoners; that it was found on the preſentment of *Iſaac Leet* foreman, and ſixteen other grand jurors particularly named, duly returned and ſworn for that purpoſe. The only thing wanting, to anſwer all the objections, is that it does not appear, on the mere records, that the court houſe in the town of *Waſhington* is within the county of *Waſhington*. I think this, from all circumſtances, ſufficiently implied, and I think the clerk ſufficiently warranted, nay I think it his duty, in making out this record to a ſuperior court, to inſert, not only the names of the judges and jurors, but to annex to the name of the place, that it is in the county of *Waſhington*. His records are for this county only; and all the proceedings which he records are in this county. Here then are full materials for making out an unexceptionable record to a ſuperior court. If, from theſe materials, a formal record were returned to a ſuperior court, that court would confirm it. And if the ſuperior court would confirm a formal return of the materials before us, we muſt confirm the proceedings, on ſufficient materials, without form; and, as we yet ſit in the ſame court, and the record is yet in our breaſt, we may even ſupply ſome materials, which may ſeem wanting. We may ſurely add, if we think it neceſſary, the name of any or each of the attending judges, and the name of the county, in which this court houſe and town is. Such a ſupplement, to the materials before us, would leave no objections to the proceed-

Long's caſe. Cro El. 490. 5 Co. 122.

ings on this indictment, but to the formal diſpoſition of them; and that, to us, is no objection. When we are required by a ſuperior court, we will put them in form. The materials, without form, are ſufficient for us. 1793.

It only now remains to examine whether theſe opinions be conſiſtent with eſtabliſhed rules; for, if they be, they are deciſive of the preſent queſtion.

It is true, that the ſtatutes of jeofails extend not to criminal proceedings; but it is alſo true, that, before thoſe ſtatutes, there were amendments at common law, and that the amendments at common law were applicable to criminal, as well as civil, proceedings.

It is true, that the court cannot amend the body of an indictment; for it is the finding of the grand jury.—But it is alſo true, that the caption of an indictment is no part of the indictment, or finding of the jury, and no part of the deſcription of the offence. What then is the caption of an indictment, as deſcribed in thoſe books, on whoſe authority the exceptions are founded? It is left as a thing of courſe, to be drawn up by the clerk of the court, when occaſion ſhall require. It is the ſtyle or preamble, or return that is made from an inferior court to a ſuperior, from which a *certiorari* iſſues to remove, or when the whole record is made up in form: for whereas the record of the indictment, as it ſtands on the file, in the court wherein it is taken, is only thus,—"*The jurors of our Lord the King, upon their oaths, do preſent,*" when this comes to be returned upon a *certiorari*, it is more full and explicit, viz.—"*Norfolk, at a general ſeſſion of the peace, held at S, in the county aforeſaid, &c. before A. B. &c. by the oath of E. F. G. &c. honeſt and lawful men, &c.*" 2 *Hawk.* 348. 2 *Hal.* 165.

An indictment taken before juſtices of the peace, and removed into the court of King's Bench, was objected to, becauſe it did not appear, that the place, where it was taken, was within the diviſion for which the juſtices were appointed. The clerk of the peace was commanded, to bring in the record itſelf, to be viewed, and if, on a view of the record, a miſtake appeared in the certificate of the caption, they would cauſe it to be amended. The caption of an indictment from any place, being left as a thing of courſe to be drawn up by *Thorney's caſe, Cro. Ja.* 276. 2 *Hawk.* 348. 2 *Hale* 170.

1793. the clerk of the court, when occaſion ſhall require, may, on motion, be amended by him, ſo as to make it agree with the original record, at any time, during the term, in which it came in, but not in a ſubſequent term; but in a ſubſequent term, the clerk, who returned it, ſhall be fined, for his informal return. A preſentment was quaſhed, becauſe it did not ſtate, before whom the ſeſſions were holden; and juſtice *Twiſden* ſaid, the clerk of the peace ought to be fined, for returning ſuch a preſentment. An indictment for a riot was removed into the court of King's Bench, and, on not guilty pleaded, was tried at the Aſſizes. On verdict for the king, among many exceptions taken and over-ruled, the one relied on was, that, in the caption of the indictment, it was not ſaid of the jurors, that they were ſworn and charged. To this the counſel replied, there is a great difference between a record made for *Niſi Prius*, which is always made briefly, and an indictment removed, with intent to be quaſhed. The words "*on oath*" ſupply the omiſſion of "*ſworn and charged.*"—The whole court held it good.

Rex v. Vaws, 1 *Mod.* 24.

Rex v. Morgan, 1 *L. Ray* 710.

From this ſtatement I conclude, that the caption of an indictment is to be conſidered not ſo much as an original, as a formal tranſcript of other materials, in the records, or, during the term, in the breaſt of the court, and, when occaſion requires, made up in form, by the clerk, from the materials neceſſarily before him. If, therefore, there be any defect in the caption of this indictment, we have ſufficient materials to amend it; and, if ſo, we cannot yield to the objection, and cannot, for any of the reaſons urged, arreſt judgment on this indictment.

Sentence of death was paſſed on the priſoner. He afterwards broke jail, and eſcaped, but was retaken. However, the governor pardoned him. And, I believe, he left this country.

ALLEGHENY COUNTY,

March Term, 1794.

ADAM BIRCHFIELD, Administrator of WILLIAM REDDEN, *v.* JACOB CASTLEMAN.

1794.

AN action of covenant on a conveyance from *Castleman* to *Redden*, of all right and title in seventy acres of land, for 70*l.* dated 13th *January*, 1781, with a warranty against all claiming by improvement. The land is near *Pittsburgh*, and was then in *Westmoreland* county. The plaintiff produced a copy of an ejectment for this land, brought in *Westmoreland* county court to *July* term, 1781, by *William Boniface* against *Redden*; in which, after issue joined, and a rule for trial, there was a judgment *nisi*, at *April* term, 1785; and an *habere facias possessionem* and *fieri facias* for 3*l.* 16*s.* 11*d.* costs returnable to *July* term, 1785.

Brackenridge, for the plaintiff, then offered to prove, that, at the time of the execution of the deed, on a conversation respecting any claims, which might be brought forward, it was agreed between *Castleman* and *Redden*, that *Castleman* should defend the suits, which might be brought, and *Redden* should pay half the costs.

Leave was given to introduce this proof, reserving the point, and making it a part of the record, that the defendant might have the advantage of it, either on a motion for a new trial, or on a writ of error.

It was then proved by the subscribing witness to the deed, who was present at the bargain, that *Castleman* (being acquainted in the country, and *Redden* a stranger) agreed, that, if any suit were brought against *Redden* for this land, he would carry it on; and *Redden* agreed, that he would pay half the costs. *Boniface*, who brought the ejectment, proved, that he had lived on the land for six months, and made an improvement on it, in 1779; that *Castleman* "*stood* the suit at *Westmoreland*,

1794. to try the title;" and that, when he brought the ejectment, in *Westmoreland*, he had no warrant for the land, but afterwards, in *December*, 1784, procured one.

Ross, for the defendant. *Castleman* was to defend againſt improvements. The proceedings in ejectment are irregular. *Redden* ought to have defended the ſuit; he did not, for he ſuffered an irregular judgment to be obtained. After iſſue joined, how could there be judgment without a trial by jury, unleſs the defendant confeſſed it. *Redden* ſuffered *Boniface* to take out a warrant firſt, having lien by five months after the office opened. *Castleman* would have taken out a warrant, if he had not ſold to *Redden*; and *Redden* ought to have done it, and ſecured the land. There is no evidence, that *Redden* furniſhed *Castleman* with half the coſts of the ejectment, as he undertook to do.

Brackenridge, for the plaintiff. *Redden* was dead before the judgment. The letters of adminiſtration are dated in *Auguſt*, 1784. *Redden* would have acted diſhoneſtly in taking out a warrant, for the land on which another had made an improvement.

PRESIDENT. If *Castleman* had notice, he was bound by his agreement, to defend the ejectment, and if he did not, he muſt take the conſequences of the recovery againſt *Redden*. Though *Redden* was to pay half the coſts, I ſee no reaſon riſing out of this evidence, as now given, to prevent his recovering damages now. If the coſts of the ejectment were meant, it ſeems he has paid them all. If the expences of *Castleman* in defending were meant, he only could aſcertain them; and he ought to have aſcertained and demanded them. Until he do this, *Redden* is in no default; and of doing this we have no evidence. A reaſonable excuſe for delay, in taking out a warrant, ariſes from the ejectment brought, immediately after the purchaſe of the land; for, in the trial of this ejectment, no warrant obtained after the commencement of the ſuit, could be given in evidence.—Pending the ejectment, the Board of Property would have given no patent, and they would have been governed by its deciſion. There was no title from the Land Office, that could have been given in evidence on that trial; and the event of that trial muſt have depended on the ſettlement or improvement right, which *Castle-*

man warranted to *Redden*. This ſettlement or improvement right was the very thing, which *Redden* bought from *Castleman*, and which *Castleman* warranted to him: it was the very eſſence of the bargain, and *Castleman* has failed in his warranty of it. 1794.

The jury found a verdict for the plaintiff, for 133*l.* 12*s.* 6*d.* damages, which was the amount of the price paid, and the intereſt, and one half of the coſts in *Westmoreland*.

At *December* term, 1794, a new trial was moved for.

Woods, for the new trial. If *Castleman's* title to this land can be examined, it will be found better, than the title of *Boniface*. And I would not move for a new trial, if I were not convinced, that injuſtice is done by the verdict, which I now move to ſet aſide.

Castleman was not bound to warrant againſt any loſs accruing from *Redden's* neglect of taking out a warrant. The judgment in *Westmoreland* is irregular, and therefore not more to be regarded, than if it had been before a juſtice of the peace. The turning *Redden* out of poſſeſſion on this judgment, is therefore irregular and a treſpaſs. *Castleman* was only bound to defend againſt a regular recovery, not againſt treſpaſſes. The deed does not bind *Castleman* to defend an ejectment, but, after a defence by *Redden*, and an eviction of him, to make good to him the loſs. The admiſſion of any parole teſtimony, varying this obligation, is inadmiſſible. This parole teſtimony is an additional contract, and a ground of an action on the caſe. The action brought is covenant on a deed. The admiſſion of this evidence is joining, in one, two actions, which cannot be joined. 1 *Powel Contr.* 421. 2 *Bla. Rep.* 1249.

Brackenridge, for the plaintiff. Whether the judgment be regular, or not, there was an *habere facias poſſeſſionem*, and we have been turned out of poſſeſſion. But it is immaterial, whether the judgment was regular or not; if *Caſtleman* was bound to defend, the ejectment, it was his buſineſs to ſee to the regularity of the judgment.

The queſtion therefore really turns upon this point; was the parole evidence admiſſible or not?

It was not to vary the agreement. It was only proof of a collateral agreement made at the ſame time; as, on a contract of leaſe, you may prove, by parole, who was 2 *Bla. Rep.* 1249.

1794. bound to repair. It is true, we could not, by parole proof, ſhew that more land was ſold, or for a higher eſtate, than the deed ſhews, but we may prove the collateral matter, of the manner, in which the warranty and defence was to be made. *Dall.* 424.

At *March* term, 1795, the opinion of the court was delivered.

PRESIDENT. This action is founded on a covenant "*to make good a tract of land, from all perſons claiming, except the lord of the ſoil, of any legal improvement, made before or after the improvement purchaſed by Caſtleman,*" who conveyed the land to *Redden*, with this covenant inſerted in the conveyance, on 13th *January*, 1781. At the trial of this action, laſt *March* term, the plaintiff produced an exemplification of proceedings in an ejectment in *Weſtmoreland* county court, brought by *William Boniface* againſt *Redden*, for this land, to *July* term, 1781. This exemplification ſtates an iſſue joined, and, afterwards, at *April* term, 1785, a judgment *niſi*, and to *July* term, 1785, an *habere facias poſſeſſionem*, and a *fieri facias*, for 3*l.* 16*s.* 11*d.* coſts.

This evidence was, *prima facie*, ſufficient to ſupport the action: and here, till ſomething to defeat it appeared, the plaintiff might have reſted. But his counſel then offered to prove, that, at the time of the ſale, and of the execution of the deed, it was agreed by the parties, that, if any ſuit was brought againſt *Redden*, *Caſtleman* would defend it, and *Redden* would pay half of the coſts.

This parole teſtimony out of the deed was objected to, but we admitted it, reſerving the point, and making it part of the record. The proof was then made, and it was alſo proved, that *Caſtleman* "ſtood the ſuit at *Weſtmoreland* to try the title;" that *Boniface* had then, no legal title for the land, but had lived ſix months, and made an improvement on it, in 1779. On this evidence, the jury here found a verdict for the plaintiff, for the amount of the purchaſe money and intereſt, and of one half of the coſts in *Weſtmoreland* county court.

The counſel for the defendant, alledging that the merits are in his favour, moved to ſet aſide this verdict, on theſe two grounds,

1. That the judgment in *Weſtmoreland* county court, being after iſſue joined, and without a trial, is irregular,

and not to be regarded. There is, therefore, no legal ouſter of *Redden*, and *Caſtleman* is not bound to defend againſt illegal acts. 1794.

2. That the parole teſtimony ought not to have been admitted, as it is a ſeparate undertaking altering the nature and effect of the covenant; and its admiſſion amounts to joining an action on the caſe, with an action of covenant. 1 *Powel Contr.* 431. 2 *Bla. Rep.* 1249.

The plaintiff's counſel, obſerving, that the judgment, whether regular or not, had turned *Redden* out of poſſeſſion, confined the argument to what he conſidered as the only point in the caſe, the admiſſibility of the parole teſtimony; which he ſupported, as not altering the contract, in any material point, but eſtabliſhing a collateral agreement, explaining the manner, in which the contract was to be executed; as, in a leaſe, you may ſhew who was bound to repair. 2 *Bla. Rep.* 1249.

The queſtion comes before us now in a ſhape, which excludes any diſcovery of merits in favour of the defendant. But, if the recovery in *Weſtmoreland* was proper, or if the parole teſtimony admitted be true, the merits are againſt him.

But whether the teſtimony be true or not, if its admiſſion was improper, the verdict muſt be ſet aſide; unleſs there be other circumſtances in the caſe, which render it of no weight, in either ſcale, and incapable of biaſſing the deciſion towards either ſide, or at leaſt, the ſucceſsful ſide, of the queſtion.

I cannot therefore ſay, that there is but one point, the admiſſibility of the teſtimony, in this caſe.—For though, if the teſtimony be admiſſible, the verdict muſt ſtand, it will not follow, that if the teſtimony be inadmiſſible, the verdict muſt be ſet aſide. To ſet the verdict aſide for inadmiſſible teſtimony, ſuch teſtimony ought to be alſo material. For if it be altogether nerveleſs, and there be other circumſtances in the caſe, which would neceſſarily make the verdict ſuch as it is; why ſet aſide a verdict for admitting teſtimony, however incompetent, that was altogether neutral and immaterial? If the teſtimony ſhould be ſuppoſed inadmiſſible, ſtill the verdict muſt ſtand, if the recovery in *Weſtmoreland* muſt be conſidered here as proper.

There may therefore be too points in this caſe, but

1794. if either of them turn out in favour of the plaintiff, his verdict muſt ſtand.

Were it neceſſary to give an opinion on both, I would ſay, that both points are in favour of the plaintiff.

An execution ouſting *Redden* from this land, and a judgment of a court of competent juriſdiction, warranting this execution, have been ſhewn. It was not neceſſary to ſhew more. It was not neceſſary to ſtate all the proceedings previous to the judgment. Such ſtatement is ſuperfluous, and, if imperfect, we ought rather to preſume a defect in the ſtatement, than an error in the court. The court had juriſdiction, and we ought to preſume a proper exerciſe of it. And though the proceedings had been irregular, the ouſter by this execution could be no treſpaſs. The caſe put, of a juſtice giving ſuch judgment, is not ſimilar. He has no juriſdiction; and though he ſhould proceed with all the ſolemnities of a competent court, his acts would be void; and his officer a treſpaſſer.

But granting, that becauſe no trial is ſtated, we ſhould believe, that no trial exiſted, I ſhould heſitate greatly to invalidate a judgment, while I could not remove its effects. We are not a court of error, to correct the judgments of other county courts. A court of error could have annulled the judgment, and ordered reſtitution of the land. We cannot do this.

True, on this firſt point merely, we cannot know, that *Caſtleman* was actually to be conſidered as a party to the ejectment in *Weſtmoreland*; and, therefore, it may be ſaid, he ought not to be affected by it, without an opportunity of impeaching it. And though, as between the parties, we certainly have no power to invalidate an exiſting judgment of a competent court of equal authority, yet, as between ſtrangers, there ſeems more ground for contending the point. But, conſidering the nature of his engagement to warrant, was *Caſtleman*, after notice of the ejectment (and he had notice, for it is proved, 3 *T. Rep.* 377. that he "ſtood the ſuit") in the ſituation of a ſtranger? Was he not competent, was he not bound, to defend it? I ſhall ſay more of this afterwards. If he did not defend the ejectment, muſt he not ſtand to its deciſion; or was *Redden* obliged to go to the *dernier* reſort of courts of error, before he could come at *Caſtleman*? Having

had judgment againſt his title, in a court of competent juriſdiction, muſt he examine all the irregular proceedings of this court, before he can call for his money? Muſt he beſtow more money and time, in coſts, expences, attendance, &c. in expectation of recovering an adequate recompence from *Caſtleman*? Perhaps he was not able, to proſecute the ſuit farther. Would it not have been reaſonable for *Caſtleman*, if he meant to diſpute the proceedings of *Weſtmoreland* court, to apply to *Redden* (if this was neceſſary) for leave to uſe his name, and, at his own expence, to have the proceedings ſet right, and the title, which he ſold, fairly inveſtigated? What are we to infer from a neglect of this? Had *Redden* refuſed to lend his name, this might have been evidence of colluſion with *Boniface*; and colluſion, or fraud, or improper conduct, on the part of *Redden*, would have been good evidence in favour of *Caſtleman*, againſt the moſt regular judgment; for no man can found his claim in fraud.—And though we ſhould hold ourſelves incompetent, to examine the irregularity of the proceedings of a court of equal authority, we have nothing to reſtrain us from examining the fraud of the parties. 1794.

On the other point, I am of opinion, that the evidence was properly admitted.

It is a principle of common law; and by the ſtatute of frauds rigidly applied to ſome particular caſes, that parole proof ſhall not be received, to vary, augment, or diminiſh a complete deed or writing. Such proof is particularly condemned, if it affect the writing in a material part; as if, in a will, it alter the diſpoſition of a legacy, or, in a conveyance of one parcel of land, it convey alſo another, or, in a leaſe, it vary the term or the rent. But if the proof offered tends to affect the writing only in an immaterial part; or to eſtabliſh ſomething collateral, as, in a leaſe, who ought to repair, or to wave part of the agreement; or, where the writing might operate in more ways than one, to ſhew the intention of the parties, which way it ſhould operate; or to rebut an equity; courts diſcover leſs nicety, and will admit the proof.

Brown vs. Selwin, Co. temp. L. Talbot 240. 4 Bro. Parl. Ca. 179. Meres v Anſtil, 3 Wils. 275. Preſton v. Merceau, 2 Bla. Rep. 1249. Lord Cheney's caſe, 5 Co. 68. See alſo Legal v. Miller, 2 Vezey 299, and Vezey jr 494.

The principle is found, and ought to be adhered to: for deeds and writings would be altogether uſeleſs, if they were liable to be annulled or explained away, by

1794. parole teſtimony. The inducement to perjury would alſo be ſtrong. At the ſame time, the inconvenience would be great, if overſights, omiſſions, and miſtakes, in points doubtful or collateral, or leſs eſſential, could not be remedied; and the danger of perjury, by admitting parole proofs, here, ſeems to be leſs.

The application of theſe principles, as in all caſes, where the boundaries are obſcure, ſeems to be attended with difficulty. In one great caſe on this point, the maſter of the rolls admitted the proof, but on appeal to the chancellor, it was rejected, though, it was ſaid, with ſome remorſe. His decree was appealed from; but the Houſe of Lords affirmed it. In another caſe lord *Mansfield*, at *Niſi Prius*, admitted the proof, and reported ſatisfaction with the verdict; but the court of Common Pleas rejected it, and ordered a new trial. It will, therefore, be no matter of ſurpriſe, if counſel on both ſides ſeriouſly entertain oppoſite opinions, or if our opinion ſhould, by one ſide, be conſidered as erroneous.

Brown v. Selwyn. Ca. temp. L. Talbot 240. 4 *Bro. Parl. Ca.* 179. 2 *Alk.* 375. *See Nourſe v. Fineh, Veſey ju.* 357 62. *Meres verſus Anſel*, 3 *Wils.* 275.

The covenant here is, in fact, a warranty of *Castleman's* improvement title, againſt all other improvement titles. The plaintiff ſhewed, that a judgment was recovered againſt his title, in favour of another improvement title. He had then ſhewed enough, and needed no further proof, till the objection was made to the regularity of this judgment. The parole proof was offered to ſhew, that the judgment was, in fact, againſt *Castleman*, for he was bound to defend. Perhaps then, it is not refining too much, to ſay, that the proof was not ſo much directly to maintain the action, or a part of the covenant, as to repel an objection made to the contingent event, on which there ſhould be a recovery againſt *Castleman*. Has it not the appearance of a collateral matter, as if, in an action for rent, one of the parties ſhewed a failure to repair, or a ſum laid out in repairs, and the other offered proof, that, ſeparately from the rent, the obligation to repair lay on him; or proof of a ſubſequent agreement to pull down, inſtead of repairing, a houſe found not worth repairing.

1 *Blo. Rep.* 1249. *Legal v. Miller*, 2 *Veſey* 299.

This covenant is a warranty, or agreement to indemnify. Let us conſider the nature of this obligation.

A creditor, for a debt contracted by a wife, having recovered againſt the huſband, who had a bond of in-

demnity againſt his wife's debts, an action was brought on this bond by the huſband. In this action, juſtice *Buller* ſays, "If a demand be made, which a perſon indemnifying is bound to pay, and notice be given him, and he refuſe to defend the action, in conſequence of which, the perſon indemnified is obliged to pay the demand, that is equivalent to a judgment, and eſtops the other party from ſaying, that the defendant in the firſt action was not bound to pay the money." 1794. *Duffield vs. Scott* 3 *T. Rep* 374, 377.

By the antient law, if the right of land or of a chattel was diſputed, the poſſeſſor might call into the action any perſon bound to warrant it; and the warrantor then became, in fact, the defendant, and was affected by all the proceedings. Leſt a landlord might colluſively ſuffer a claimant to recover judgment againſt him in a real action, and, thereby, turn out his tenant, before the expiration of his term, an opportunity was allowed the tenant, to queſtion the fairneſs of the recovery, and, if it appeared colluſive, the execution was ſtaid, till the expiration of his term. Leſt tenants ſhould colluſively give up their poſſeſſion to adverſe claimants, and diſpoſſeſs their landlords; landlords are permitted to become defendants in ejectment. And, in any caſe whatever, when a perſon bound to indemnify another has had notice that a ſuit is brought againſt the perſon indemnified, for the thing which is the ſubject of indemnity, it would ſeem, from the expreſſions of juſtice *Buller*, that it is the duty of the indemnifier to ſtep into the place of the indemnified, and become defendant in his room. If he fail to do this, he ſeems to loſe his right of obliging the perſon indemnified to a rigorous defence of the action, and to become himſelf liable to all the conſequences of his neglect. 1 *Reeve Eng. Law* 132, 167 437. 2 *Reeve* 120, 145, 150, 185. 3 *T. Rep.* 377.

This ſeems to be the ſenſible and juſt method of performing a warranty or indemnification. It ſeems to be ſupported by antient and modern principles. It ſaves time, coſts, and circuity of action, which the law abhors, and it does juſtice at once. And if, when the ejectment was brought in *Weſtmoreland* againſt *Redden*, he or *Caſtleman* had called on a profeſſional lawyer, to give his opinion on this covenant, in what manner, the warranty ought to be performed, I think, his opinion would have been, that the proper, natural, and legal conſtruction of

1794. this warranty is, that *Castleman* knowing the witneſſes, and the merits of the title, ſhall take upon him the defence of the action. This is preciſely the conſtruction, which the proof ſhews the parties to have put on it.

Does then this parole agreement of *Caſtleman's*, to defend any ejectment, annul the written covenant, or defeat it, or enlarge it, or diminiſh it, or otherwiſe vary it? I think not. I think this parole proof eſtabliſhes the covenant, in its legal, natural, and juſt conſtruction, and gives it a proper force, and honeſt effect. To exclude this teſtimony, is only to leave room to impoſe on the covenant a conſtruction leſs natural and juſt, which will produce its effect indirectly and circuitouſly, and put all parties to greater expence, and which has not more, but rather leſs, the ſanction of legal principles and practice, than the conſtruction put on it by this agreement. Shall we then exclude the teſtimony? Do the words of the covenant exclude the conſtruction put on them, by this agreement? Or do they neceſſarily or properly imply, that the warranty ſhall not operate, unleſs there were firſt a recovery againſt *Redden* in an action, in which *Caſtleman* ſhould have no concern? I think not.

Therefore, I think, the evidence was properly admitted. Its admiſſion eſtabliſhes that *Castleman* was bound to defend in the ejectment. If ſo (as he had notice) the ſuit was his; and, whatever irregularities there may have been in it, he muſt abide by them. I even know not, whether, from the opinion of juſtice *Buller* (and no opinion is more reſpectable) it may not be fairly inferred, that the reſult would be the ſame, had no ſuch parole agreement exiſted, but only notice of the ejectment, and a call to defend it.

PENNSYLVANIA *v.* CHARLES CRAIG, ADAM CRAIG, and four others.

THE defendants were indicted for a riot, in beating *William Rowley*. The provocation was, that *Rowley* ſaid, that it was a burleſque on the county, that old Mr. *Craig* (the father of the two *Craigs*, and then lately dead) ſhould be a county commiſſioner.

It was doubtful whether the evidence affected any but *Charles Craig*; and there was no count for an aſſault and battery. 1794.

Roſs, for the defendants, expatiated on the provocation, and ſtated, that there could be no conviction unleſs three were guilty. 1 *L. Ray.* 484.

PRESIDENT. Government is eſtabliſhed, to reſtrain the paſſions of men, by certain rules. Whether theſe rules be the beſt, that might be eſtabliſhed, or not; while they exiſt, they muſt be preſumed the beſt, or, whether or not, they muſt be ſubmitted to. We are ſet, to execute, not to make, laws. Juries are not courts of honour or diſcretion, at liberty to do as they pleaſe, but bound by oath, to judge according to truth, and the rules of the ſtate, that is the laws. According to our laws, no words, however irritating, will juſtify a battery. Our laws allow force only to repel force.

It is the duty of all men, to preſerve the peace: and thoſe citizens, who ſtand by ſilently, and ſee, without endeavouring to prevent or reſtrain, a breach of the peace, are to blame; and, if the paſſions of the injured perſon ſo far miſlead his judgment, as to lead him to conſider and proſecute thoſe ſpectators as parties, their fate is not to be regretted; and though a jury will not, for this only, convict them, yet this paſſive conduct, and defect of duty, may be conſtrued as an acquieſcence in the offence, if not an approbation of it, and a preſumption of guilt may be drawn from it, if it be not explained by other circumſtances.

To make a man a party to a riot, he muſt be active, either in doing or countenancing, or ſupporting, or ready, if neceſſary, to ſupport the unlawful act. If any one of theſe perſons, with any two others, whether of theſe or not, committed the unlawful act charged in this indictment, you will convict him or them named in the indictment of this riot. If the unlawful act was done by only one, without any aiding or abetting him, this one, though guilty of an aſſault and battery, muſt be acquitted on this indictment for a riot, which is a more aggravated offence.

Verdict—not guilty.

WILLIAM LEA *v.* WILLIAM LITTLE.

1794. LEA brought an action of debt againſt *Little*, a juſtice of the peace, to recover 50*l.* the penalty, for marry-
1 *St. L.* 36, 246. ing his daughter, a minor under the tuition of her father, contrary to the directions of the ſupplement to the act intitled An act for preventing clandeſtine marriages.

Roſs, for the defendant, offered to prove, that *Lea* acquieſced in the marriage, and received the parties into the houſe afterwards.

Brackenridge, for the plaintiff, objected, that this was only ſubmitting to a thing, which he could not prevent; it was an act of humanity and paternal affection; and amounts only to this, that *William Lea* had the ſenſe and kindneſs not to transfer his reſentment againſt the magiſtrate, to his daughter and his ſon-in-law, now irrevocably bound together.

But ſome favourable circumſtances appearing on the
1 *St. L.* 604. part of the juſtice, and the plaintiff not having ſerved
See the caſe of Macklin v. Taylor, poſt. notice before bringing the action, a compromiſe was re-
and of Huſton v. Ayres, poſt. commended and agreed to. The defendant paid the coſts, and the plaintiff waved all further claim to the penalty.

WILLIAM M'CLURE *v.* ROBERT WHITE.

1 *St. L.* 617. PROCEEDINGS, on what is called the land-lord and tenant law, before two juſtices of the peace, were removed by *certiorari* into the county court.

Young and *H. Roſs*, moved to quaſh the *certiorari*.

1. Becauſe, under this law, the proceedings can be
ib. 618 removed into the court of Common Pleas, only in caſe of an adverſe title.

2. Becauſe this is a ſummary remedy, which a *certiorari* would altogether defeat; and
1 *T. Rep.* 83, *L. Ray* 469. 3. Becauſe the *certiorari* ought not to have iſſued, but on cauſe ſhewn.

Sect. 13. PRESIDENT. The ſection in the law, which points
1 *St. L.* 618. out a particular and the only caſe, of ſuſpending the proceedings of the juſtices to judgment, relates only to the trial of facts and the right; and does not reſtrain a ſuperior court, from examining the regularity of the proceedings, after the juſtices have tried the facts and the right.

PENNSYLVANIA *v.* ABRAHAM KIRKPATRICK and SAMUEL MENOUGH

AN inquiſition of a forcible entry and detainer, taken before two juſtices of the peace in *Allegheny* county, being removed by *certiorari* into the county court,* inſtead of traverſing the inquiſition, and trying it by a jury, 1794.

* As this caſe was greatly litigated, before it came into court, it may not be amiſs to give a narrative of its progreſs.

The defendants applied to one of the judges of the court of Common Pleas of *Allegheny* county, for his allowance of a *certiorari*, to remove the proceedings into the county court, and obtained it. The counſel for the proſecution objected to the *certiorari* as irregular, and applied to the judge to ſuperſede it. Some doubts ſubſiſting, the judge ſent to me the following caſe, for my opinion, 30th *January*, 1794.—"Inquiſition of a forcible entry and detainer found before juſtices of the peace. *Certiorari*, at the prayer of the defendant, allowed by a ſingle judge in vacation, as of courſe, without ſpecial cauſe ſhewn.

"*Quere* 1. Has a judge, in vacation, authority to allow a *certiorari*, to juſtices of the peace, in the above caſe? If ſo, is it iſſuable of courſe, or muſt ſpecial cauſe be ſhewn.

"H. H. BRACKENRIDGE, *for proſ.*
"STEEL SEMPLE, *for def.*"

This caſe was accompanied with the following notes by Mr. *Brackenridge*.

"A *certiorari* is a writ out of the King's Bench, which appears to have been grantable only on motion, in open court. Every caſe reſpects moving for a *certiorari* or *procedendo* to ſuperſede it. No idea of a *certiorari* having iſſued from a judge in vacation. This would ſeem not to have been known to the law, any more than a *mandamus*, or attachment, or other ſuperintending and relieving writ. The power of a judge in vacation, to iſſue this writ, appears firſt in the act of 5th and 6th *William* and *Mary*, ſince the charter of *Penn*, and, therefore, not a ſtatute of our law. *Queen v. White*, is a caſe ſince that ſtatute. Our ſtatute of 13th *April*, 1791, empowering the Supreme court, or a judge of that court, to allow writs of *certiorari*, argues the authority to have been otherwiſe at common law. *King v. Eaton*, is

1 *Salk.* 144.
2 *Hawk.* 409.
1 *Salk.* 150.
3 *St. L.* 94.
2 *T. Rep.* 89.

1794. the counsel on both sides, presented the following written agreement to the court, 8th *March*, 1794.

decisive, that a *certiorari* ought not to have been granted in vacation, but in open court, and on a ground shewn. But,

3 *St. L.* 94. by our statute, a judge of the Supreme court in vacation, on special ground shewn, can issue a *certiorari* to the sessions of

Penn. Const. v. 8. the peace, &c. and by our constitution, the judges of the courts of Common Pleas, have the like powers with the judges of the Supreme court, to issue writs of *certiorari* to the justices of the peace. The court of Quarter Sessions is now one thing, and the justices of the peace another. Therefore the power of the Supreme court, with respect to the justices, remains as it was at common law. Of course,

2 *Hawk.* 407-8. the power of the court of Common Pleas, with respect to them, remains the same: and a *certiori* to the justices, in

4 *Comm.* 316. 1 *L. Ray* 469, 580. 2 *L. Ray* 938, 1452. their summary jurisdiction, is grantable only by our Supreme court, or court of Common Pleas, on motion, in open court, and not by a judge, in vacation. But, if allowable

1 *Bac.* 349-57. *Doug.* 721, 2 *T. Rep.* 89. 1 *Burr.* 488. 4 *Burr.* 2457-60, 2522. by a judge in vacation, at all, it must be done on cause shewn. I speak of the case of a *certiorari* prayed for by the defendant, or, on a liberal construction of the principle, by a private prosecutor using the name of the Commonwealth.

"From the whole of the authorities, and the scope of the reasoning in the books, in cases of *certiorari*, it is evident, that a writ of this nature is not grantable of course.

"In the summary jurisdiction of the justices, it would totally defeat the object of the law, as to summary redress, if the inquisition were removeable of course. In all criminal cases, it clearly cannot; and I should conceive, that, in all summary cases of a civil nature, the *certiorari* will be grantable, only to give a revision of the proceedings, and to set aside for want of jurisdiction, or for irregularity.

"It had been an early practice in this country, and, I believe, in the middle counties of *Pennsylvania*, to consider the *certiorari* in a criminal, as well as in a civil case, as issued of course. But in the year 1785 or 1786, I think, at *Chambersburgh*, a decision was formally given, by the judges of the Supreme court, that the *certiorari* was not a writ of course, but obtainable, at the prayer of the defendant, only on motion. The reason is, that otherwise it would be in most cases, used for the purpose of delay."

Such were the notes of Mr. *Brackenridge*. I would ob-

2 *T. Rep.* 90. serve, that the expressions of justice *Buller*, in one of the cases cited, may render it questionable, whether a single judge of the court of King's Bench in *England*, had autho-

"Agreed, that a verdict for the Commonwealth be entered, on this inqueſt, ſubject to the opinion of the court on the following caſe. 1794.

rity to iſſue writs of *certiorari*, before the act 5 and 6, *W*, and *M*, which gave this authority. 5, 6, *W.* & *M.* § 5.

The act for eſtabliſhing courts of judicature in this province, gave the judges of the Supreme court all the authority of judges of the King's Bench, Common Pleas, and Exchequer, in *England*; it therefore gave them all the authority, which the ſtat. 5. 6. *W.* and *M.* had before given to the judges of the King's Bench; and beſides, it expreſſly gave authority, to iſſue writs of *certiorari*, &c. 1 *St. L.* 171, § 13. § 11.

The judges of the Supreme court, then, probably iſſued writs of *certiorari* to juſtices of the peace, acting ſpecially, in the ſame manner, as to inferior courts; and the ſeventh ſection of the act to eſtabliſh the judicial courts of this Commonwealth, is but a recognition of what their practice was before that act. 3 *St.* L. 94.

Until the preſent conſtitution, the county courts were compoſed of juſtices of the peace, and had no power to ſend a *certiorari* to any juſtice acting individually. This power was in the judges of the Supreme court only.

When the Convention of 1789 was new modelling, the county courts, and eſtabliſhing them on a more reſpectable footing, it was propoſed to give them juriſdiction in capital caſes. But that a priſoner, to be tried for his life, might have the benefit of the moſt enlightened tribunal in the ſtate, it was propoſed, "that the parties accuſed, as well as the Commonwealth, may remove the indictment and proceedings into the Supreme court *at any time before trial.*" An amendment of this propoſition was introduced, ſubſtituting, inſtead of the words "*at any time before trial*," the following proviſion; "*but no writ of removal, preſented by the party accuſed, ſhall be allowed by the court, where the indictment ſhall have been found without the conſent of the attorney general, or ſpecial cauſe ſhewn, unleſs the ſame ſhall have been ſpecially awarded by the Supreme court, or one of the juſtices thereof.*" This amendment was almoſt unanimouſly rejected by the convention; becauſe it altogether ſuperſeded the proviſion of removal into the Supreme court, by the party accuſed, and left the juriſdiction in the county courts, the ſame, as if no ſuch proviſion had been made; for, if nothing had been ſaid of removal, the law and practice, as it ſtood before, would have ſecured a removal on *Journals of Convention*, 17*th February* 1790. *p.* 104-5.

1794. *Alexander Fowler*, the profecutor, being ſeized of the premiſes mentioned in the inquiſition, and in actual poſſeſſion of the ſame, judgments were entered againſt

the terms propoſed by this amendment; and becauſe it was the intention of the convention, while they gave to the county courts juriſdiction in capital caſes, to annex, to this juriſdiction, a condition of enlarging the power of removal, by defendants, into the Supreme court. The matter ſtood thus in the convention; it was thought proper, to give the juriſdiction, but not without extending, as far as poſſible, the power of removal, by the perſons accuſed; when it was propoſed, that the proviſion for removal ſhould be, "that the parties accuſed, as well as the Commonwealth, may, *under ſuch regulations, as ſhall be preſcribed by law*, remove the indictment and proceedings into the Supreme court." This propoſition was adopted. But when, in conformity to this proviſion of the conſtitution, the legiſlature proceeded to preſcribe regulations for the removal, by parties accuſed, of indictments and proceedings into the Supreme court; they preſcribed this regulation, that "*the certiorari ſhall be ſpecially allowed by the Supreme court, or one of the juſtices thereof, upon ſufficient cauſe to it or him ſhewn, or ſhall have been ſued out with the conſent of the attorney general.*" This regulation, like the amendment firſt propoſed, and almoſt unanimouſly rejected in the convention, added no new privilege to the parties accuſed, eſtabliſhed the regulation, which the convention had rejected, entirely defeated the proviſion for the removal, and left the juriſdiction in the county courts, as if no proviſion for removal had been made, and it reſted only on the law and practice in the courts of *England*, and in the Supreme court, which had the ſame authority and rules.

3 *St.* L. 94.

The conſtitution gives to the judges of the courts of Common Pleas, within their reſpective counties, like powers with the judges of the Supreme court, to iſſue writs of *certiorari* to the juſtices of the peace, and to cauſe their proceedings to be brought before them, and the like right and juſtice to be done. Therefore judges of the county courts of Common Pleas here may, within their counties, iſſue writs of *certiorari*, as judges of the King's Bench in *England* could do.

4 *Burr.* 2457. 2 *T. Rep.* 89, 90. 2 *Hawk.* 407.

Now in *England*, the king has a right to demand a *certiorari*, and it cannot be refuſed him. A private profecutor, borrowing, as he muſt, the name of the king, for a proſecution, in which the king takes no intereſt, has a *certiorari*

him, upon which executions iſſued, the premiſes were ſeized, condemned, and ſold by the preſent ſheriff, and a deed was executed by him to *Abraham Kirkpatrick*, 1794.

of courſe, unleſs cauſe be ſhewn againſt it. But a defendant cannot have a *certiorari*, unleſs he firſt ſhew cauſe for it.

Any *certiorari*, iſſuing for a defendant, without ſpecial cauſe ſhewn, is irregular, and will be ſet aſide.

My opinion on the above caſe was tranſmitted to the judge as follows.

The authority of the judges of the courts of Common Pleas, to iſſue writs of *certiorari* to juſtices of the peace, is derived from the 8th ſection of the 5th article of the conſtitution, which gives them the like powers with the judges of the Supreme court. The judges of the Supreme court had the like powers with the judges of the court of King's Bench; which court had a general ſuperintendance over all inferior juriſdictions. Therefore, if we can diſcover what were the regulations, under which writs of *certiorari* were iſſued by the judges of the King's Bench, we ſhall, of courſe, know the regulations for iſſuing them by the judges of the Supreme court, and the judges of the courts of Common Pleas; for they will be the ſame.

Comparing the expreſſions of juſtice *Buller*, with the proviſion of the act of Parliament 5, 6, *W.* and *M.* it does appear probable, that, before that act, writs of *certiorari*, for the defendant, were not granted but by the court in term time. 2 *T. Rep.* 90. c. 11 §. 5. 2 *Hawk.* 409.

Yet there is an inconvenience in this: and the clauſe in the 7th ſection of the judiciary law, which relates to writs of *certiorari* being allowed by one judge of the Supreme court, is not ſo much the introduction of new law, as a recognition of former law or eſtabliſhed practice; and ſeems to be the ſame as that given by the act of parliament to the judges of the court of King's Bench, and by the act of aſſembly veſted, with the other powers of the judges of the court of King's Bench, in the judges of the Supreme court; and the 11th ſection of this act of aſſembly expreſsly gives any one judge of the Supreme court power to iſſue writs of *certiorari*. So that the 7th ſection of the act of 1791, gave no new powers to the judges of the Supreme court; and their powers being the ſame with thoſe of the judges of the court of King's Bench in *England*, it is probable, that their practice was alſo the ſame. And it is probable, that, reſpecting writs of *certiorari* directed to juſtices acting ſpeci- 3 *St. L.* 94. 1 *St. L.* 171, 180, 179.

1794. the purchaſer and one of the defendants, (prout judgment, execution, and deed). The ſheriff, after the acknowledgment of the deed, went to the premiſes with *Abraham Kirkpatrick*, *Samuel Menough*, and others, broke open the door of the mill, in which there was no perſon, and gave poſſeſſion of the mill to *Abraham Kirkpatrick*, who left *Samuel Menough* in poſſeſſion for him, as his tenant. *Alexander Fowler* entered, and forcibly turned *Samuel Menough* out of the mill, and held the poſſeſſion.

ally, they adopted the ſame rules, as reſpecting thoſe writs directed to juſtices as a court of Quarter Seſſions. At leaſt I know not the contrary.

But it ſeems to be ſettled, that a *certiorari* on the part of the defendant, and without the direction or conſent of the attorney-general, is never granted, but on cauſe ſhewn, and eſtabliſhed by *affidavit*. And, if granted otherwiſe, it ſeems to be always ſet aſide. And, in the caſe of a forcible entry and detainer, I think the cauſe ſhewn ought to be good, and clearly made out; as the *certiorari* prayed for is to delay the execution of a ſtatute, intended as a ſummary and ſpecific relief againſt an act of violence; and, if the caſe require it, all equitable terms ought to be laid on the defendant.

The above opinion, tranſmitted by me to the judge, being againſt the *certiorari*, as iſſued, the counſel for the defendant, as Mr. *Brackenridge* ſtated to me, attempted to ſupport it by procuring the conſent of the attorney for the ſtate. "This," ſays Mr. *Brackenridge*, "I conceive could not help it.

"1. Becauſe the conſent was not given before the iſſuing, and ſo the writ did not iſſue by conſent, but without conſent.

4 *Burr.* 2458. *Rex v. Pufey*, 2 *Str.* 717, *and by analogy, ſee Rex v. Hales* 2 *Str.* 816 *and Rex v. Elford* 2 *Str.* 877.

"2. Becauſe, it being the caſe of a private proſecutor, the attorney had no right to interfere.

"The law is clear, that the attorney cannot *demand* a *certiorari* for the proſecutor; and why, without his conſent, allow one to the defendant. It ſtrikes me as unreaſonable, that, as the prerogative or power of the attorney, to aſſiſt a private proſecutor, is taken away, it ſhould exiſt, to injure him. However, the buſineſs was ſet right, at laſt, by obtaining a new writ, on affidavit filed, and conditions impoſed."

Rex v. Farewell, 2 *Str.* 1209. 6 *T. Rep.* 197.

But it ſeems to have been determined that a proſecutor is not bound to make affidavit or enter into recogniſance.

The ſheriff, after this, returned to the premiſes, together with *Abraham Kirkpatrick*, *Samuel Menough*, and others, who attended the ſheriff, by his order; and, with force and arms, broke the dwelling houſe of *Alexander Fowler* on the premiſes, entered, and forcibly put him out, and gave poſſeſſion of the houſe to *Abraham Kirkpatrick*. Whilſt the ſheriff was breaking the houſe, *Abraham Kirkpatrick* and others, who came with the ſheriff, went into the mill, the door of which was open, took poſſeſſion, and held it with force, and ſtill does hold, againſt the ſaid *Alexander*, the houſe, and mill, and premiſes, then ſold and delivered to him. If the court is of opinion, &c. then, &c. This caſe not to bar any exceptions to the form and regularity or effect of the proceedings previous to the ſettlement of this caſe. 1794.

" H. H. BRACKENRIDGE, for proſ.
" JAMES ROSS, for def."

This caſe was argued by *Brackenridge* and *Young*, for the proſecutor, and by *Roſs*, for the defendants.

Brackenridge. The queſtion is, whether, on an execution, and ſale of land, under the act of aſſembly, the ſheriff can give poſſeſſion to the purchaſer. 1 *St. L.* 67.

Eſtates could not be aliened, at diſcretion by the owner, becauſe his heirs and the public had an intereſt; and therefore lands were not made ſubject to debts, but after long time, and under great reſtrictions. Eſtates leſs than freehold were leſs favoured, and leſs in proportion as they approached the nature of chattels. Eſtates for years, or chattels real, may be taken in execution. To encumber land, certain ſolemnities were preſcribed. On the ſale of a term on a *fieri facias*, poſſeſſion cannot be given; nor, to execute a *fieri facias*, can doors be broken; therefore no poſſeſſion can be given. If the ſheriff ſell a leaſe, he cannot turn the tenant out of poſſeſſion, but the vendee muſt bring an ejectment. At the ſuit of the king, or on a *habere facias poſſeſſionem*, the ſheriff may break open doors. A perſon having a right of entry may enter *peaceably*, and, being in poſſeſſion, may retain it, and plead his right. *Buller*, juſtice, inclines to think, the ſheriff may turn out the perſon againſt whom the judgment is. But he ſpeaks cautiouſly, which implies, there never had been an inſtance of it, and he

2 *Comm.* 287, 290, 180. 3 *Comm.* 417. *Stat.* 11 & 13 *Edw.* 1. 27, *Edw.* 1. 3 *Comm.* 417. 2 *Bac.* 351, 367 2 *Shower* 85. 3 *T. Rep.* 298.

1794. rather ſeems to expreſs what the law ought to be, than what it is. This is a mere ſpeculative opinion, and in the caſe of a leaſe, *Kenyon*, chief juſtice, ſays, under an *elegit*, the ſheriff could not deliver the land. The ſtatute giving the *elegit*, ſays the ſheriff ſhall deliver. The act of aſſembly, for taking lands in execution, directs, that
1 St. L. 68. where it extends, the ſheriff ſhall deliver as upon writs of *elegit*. The act ſurely does not mean more, where, as on a *fieri facias*, all property is deveſted. There is good reaſon, that poſſeſſion ſhould not be given under ſuch a writ, without farther enquiry. The ſheriff levies an indefinite tract of land, without metes, &c. It is proper, that there ſhould be an ejectment, to examine all the circumſtances, and aſcertain the ſpecific quantity ſold, and then a writ will iſſue, ordering the ſheriff to give poſſeſſion, as the former execution ordered him to ſell.

But, be the reaſon of the law what it may, the law has been, that no poſſeſſion can be given on a *fieri facias*. No inſtance has ever been of ſuch poſſeſſion given. Hence a ſtrong preſumption, that none can be given.

Roſs, for the defendants. It is true, by the common law, grounded on feudal principles, a judgment could not affect lands. They were a benefice for military ſervice, the common tie between lord and tenant; and no alienation could be permitted, leſt an enemy ſhould be made tenant. Even a ſon muſt be admitted by the lord, before he could enjoy the poſſeſſion of his father. As military tenures were ſlackened, and commerce increaſed, the neceſſity of ſubjecting lands to debts became evident.

Comp. 1. The privilege of a houſe has been unreaſonably extended, and is to be taken ſtrictly. Does the ſame privilege extend to houſes and lands, when they themſelves
2 *Bac.* 358. become ſubjects of execution? Chattels only were liable to debts; becauſe the debt was but a chattel.—Land was not liable, becauſe it was the means of procuring military ſervice, and defence of the kingdom. Afterwards commerce ſubjected lands to debts. The difference is as great between our ſituation and ſyſtem of property, and that of *England*, at the time of the deciſions cited againſt me, as between the ſituation of *England* then, and its ſituation before land could be ſold at

all. When the law gives the end, it muſt give all the means neceſſary to accompliſh it. When land is ſubjected to execution, it muſt be ſeized by the ſheriff, in the ſame manner as chattels may be ſeized; for otherwiſe the power of ſeizing would be nugatory. Our act of aſſembly made lands liable to execution. This makes them chattels for the payment of debts; and they have always been ſo conſidered. 1794. 1 St. L. 12.

On *elegit*, the ſheriff is to deliver to the creditor, but half of the land. The ſheriff cannot turn the debtor out of his own ſhare: it is an undivided moiety. The ſheriff holds an inquiſition; afterwards, a *liberate* iſſues. Our execution enables the ſheriff to ſeize land. And, from this time, he continues conſtructively in poſſeſſion. His entry and poſſeſſion are lawful, and even by the command of the law.

The deſcription of the land indorſed on the *fieri facias*, and inſerted in the advertiſement of ſale, and in the deed, is more ſpecific, than the deſcription in ejectment. And the tenant may, at any time during the proceeding to ſale, or before the execution and acknowledgment of the deed to the purchaſer, come in and make his objections.

As in the caſe of a recovery or fine, all the parts make but one whole title, and have a mutual relation: ſo the *fieri facias*, the ſeiſure, and the *venditioni exponas*, the ſale, and the deed, make but one: and the ſheriff is ſuppoſed to be always in poſſeſſion. The act of aſſembly enables the ſheriff to give a deed veſting in the purchaſer all the debtor's title, at the time of the judgment. I contend, the ſheriff, under the *fieri facias*, may turn out any tenant of the debtor, whoſe title accrues ſubſequent to the judgment.

It is not material here, whether the ſheriff can break open the door, to take chattels out of the houſe. For here he may take the houſe itſelf. This is a caſe different from the other of which the *Engliſh* books ſpeak.—Why enable a ſheriff to take a *horſe* by force, and not a *houſe*?

Though the ſheriff be not ſtrictly juſtifiable in breaking doors, to make execution, yet, if he do it, the execution is good; and the party is turned round to his remedy againſt the ſheriff. 5 Co. 93. 4 Bac. 454.

1794.

The case in *Shower* is quoted in *Taylor v. Cole*; and yet justice *Buller*, is of opinion, that the sheriff may give possession.

2 *Show.* 85.
3 *T. Rep.* 298.

Young, for the prosecutor. In construing statutes, we must consider, 1, what the common law was before;—2, what was the mischief intended to be remedied; 3, what the remedy is; and 4, what is the reason of that remedy.

1 *St. L.* 12.

Our act of assembly makes lands liable to sale, and gives a clear estate in them to the purchaser; but no authority to give possession; no *liberate*, which in *England* is necessary to give goods to the creditor. Many estates have been sold, without the knowledge of the debtor. The acts of assembly give the sheriff no possession; only authority to sell, with a power to enter on the land, to ascertain it. Having sold, the sheriff is *functus officio*. Statutes are to be construed according to the reasons of the common law. Judges are not legislators. Land is to be delivered as on writs of *elegit* in *England*. No property can be delivered without a *liberate*. The acts give no authority to the sheriff to give possession, therefore he cannot do it, however right it might be.—Courts cannot exceed their authority; much less can ministerial officers. No fees are mentioned for this service, in the table of fees. The laws, rendering lands subject to execution for debts, make not lands chattels, but assets. In *elegit*, it is not an undivided moiety, that is delivered; but a moiety by metes and bounds. I have known ejectments brought on a *liberari facias*.

1 *Str.* 45, 358.
1 *St. L.* 68.
Doug. 456.

The whole proceeding, the levy, the sale, and the deed, is but a conveyance, and operates as nothing more. It transfers the right, as if the owner himself had made the conveyance. The law gives the sheriff authority to seise, levy, and sell. He has no possession, and therefore can give none; for he can give no more than he had. He had no right to take possession; for, if he had, he might, at the seisure, have turned *A. Fowler* out of doors, and occupied and enjoyed the premises: for that only makes possession. Entry makes seisin, and enables to convey; but makes not possession. The sheriff, therefore, conveys the right, but does not surrender the possession. That, if detained, must be obtained, with damages for the detention, by a direct suit, when possession will be the object.

3 *Comm.* 173 *a.*

At *June* term, 1794, the opinion of the court was delivered. 1794.

PRESIDENT. An inquiſition of forcible entry and detainer, taken before two juſtices of the peace, having been removed, by *certiorari*, into this court, at the laſt term, the counſel for the parties preſented the following caſe for our opinion.

" Agreed, that a verdict," &c. *ante* p. 195.

The queſtion in fact is, whether a ſheriff, on a ſale of lands taken in execution on a judgment, under the act of aſſembly is authoriſed to turn out the defendant poſſeſſor by force, and put the purchaſer in poſſeſſion.

There are ſome circumſtances in the preſent caſe, different from the mere abſtract queſtion. But, in the argument, no ſtreſs was laid on them, and, perhaps, it may not be neceſſary to rely on them in making up our opinion. The abſtract queſtion only was conſidered then : perhaps the abſtract queſtion only need be conſidered now.

The argument for the proſecutor relied ſtrongly on the unalienable quality of lands at common law, and the great heſitation, with which ſtatutes ſubmitted them to debts ; and ſtating, that all ſtatutes, in derogation of the principles of the common law, are liable to a ſtrict conſtruction, concluded, that our acts of aſſembly, which gave authority to ſheriffs to ſell lands, enabled them only to convey the right, not to change the poſſeſſion ; and that, to ſuppoſe the contrary, would authoriſe the ſheriff, immediately on receiving the *fieri facias*, to turn the debtor out of poſſeſſion, and to occupy the land himſelf, and receive the profits, till the time of the ſale. But, as the act of aſſembly does not authoriſe the ſheriff to do this, before the ſale, he cannot do it after, for then his authority ceaſes ; and the purchaſer, like every other owner out of poſſeſſion, muſt acquire it in a peaceable manner, or compel it by a direct ſuit, when that and damages will be obtained by an execution for that purpoſe. It is ſettled, that a ſheriff cannot break open an outer door, to execute a *fieri facias* : how then can he give poſſeſſion of a houſe ? Though a term, being a chattel, may be ſold on a *fieri facias* ; or a moiety of land delivered on an *elegit*, yet, in neither caſe, can the ſheriff give poſſeſſion. The purchaſer and the creditor muſt ob-

1794. tain poſſeſſion, by ejectment. There is great reaſon, why a defendant ſhould not be concluded by the proceedings in an execution, of which he may not have had notice, nor be turned out of doors without an opportunity of defence. Even if this were a regulation proper to be eſtabliſhed, courts cannot take on them the authority of legiſlation; and they have no precedent or authority, to warrant them in giving ſanction to this proceeding. There is no inſtance of this having ever happened either in *England* or *Pennſylvania*. The opi-
3 *T. Rep.* 298. nion of juſtice *Buller*, in the caſe of *Taylor v. Cole*, is on a point not judicially before him, is in the caſe of a leaſe not of a fee ſimple, is expreſſed cautiouſly, as on a new ſubject, and indicates rather what the law ought to be,
ib. 295. than what it is. And, in the ſame caſe, lord *Kenyon*, chief juſtice, ſays, that on an *elegit*, the ſheriff could not deliver the land.

Againſt theſe arguments for the proſecutor, the counſel for the defendants contended, that the unalienable quality of lands, at common law, proceeded from the peculiar nature of feudal tenures, being conſidered as a benefice for military ſervice. But theſe principles have gradually given way to the progreſs of commerce: and our acts of aſſembly, ſubjecting lands to execution and ſale for debt, completely reduces them to the ſtate of chattels; and, if they may be ſeized as chattels, it follows, that they may be ſeized by force. The whole proceeding, the *fieri facias*, the ſeizure, the inquiſition, the *venditioni exponas*, the ſale, and the deed, are, as in the caſe of a fine or recovery, to be conſidered as one tranſaction; and the ſheriff to be conſidered as in poſſeſſion from the ſeizure. The proceedings give ſufficient notice, and opportunity of defence, to all parties concerned. It is not material, whether, in *England*, the ſheriff can break open the door of a houſe, to ſeize chattels; for, here, he may ſeize the houſe itſelf. And, there, the irregularity of breaking the door does not avoid the execution, it only ſubjects the ſheriff to an action of treſpaſs. The
2 *Show.* 85. caſe in *Shower*, which lays it down, that, on the ſale of a term, the ſheriff cannot turn out the tenant, but the vendee muſt bring an ejectment, was cited in the caſe
3 *T. Rep.* 298. of *Taylor v. Cole*, and yet there juſtice *Buller* gives it as his opinion, that the ſheriff might turn out the tenant.

Such ſeems to me the material ſubſtance of the arguments in this caſe. They were ample and well directed. No deciſion has been diſcovered, to juſtify the power exerciſed by the ſheriff, on this occaſion. What then ſhall we ſay? Has an attempt been made, in this caſe, which was never made before? Or has it often been made, and found ſo palpably juſtifiable as never to have been called in queſtion? This cannot be, for there is a deciſion againſt it. I am inclined to believe, therefore, that the attempt has been ſeldom made; and is now defended, not by any precedent, but on the authority of juſtice *Buller*; on the terms or intent of our acts of aſſembly, for taking lands in execution for payment of debts; and on the principles of general convenience. 1794. 2 *Shew.* 85. 1 *St. L.* 12, 67.

1. If accuracy of judgment, and knowledge of the ſubject, can give weight to an opinion, there are few, if any, whoſe opinions are entitled to more reſpect, than thoſe of juſtice *Buller*. The caſe, in which his opinion was given, differs eſſentially from the caſe before us.—I ſpeak of the caſe of *Taylor v. Cole*, as it appears in *Term Reports*, and in *H. Blackstone's Reports*. That was an action of treſpaſs againſt a ſheriff. In that caſe, the entry of the ſheriff was lawful and peaceable, and there was no expulſion by the ſheriff. His entry was lawful, by virtue of a *fieri facias*, to be executed on the houſe; and the jury acquitted him of both the force and the expulſion. This is an entry and expulſion made with force. That caſe was a civil action. This caſe is a criminal proceeding. Though the caſe of *Taylor* and *Cole*, aroſe on a ſheriff's ſale; yet there is nothing in the manner in which the court examine it, to juſtify an idea, that a forcible expulſion, by virtue of a ſheriff's ſale, is not within the ſtatutes of forcible entry and detainer; but rather that it is within thoſe ſtatutes. The chief juſtice, without diſtinguiſhing in favour of ſheriff's ſales, ſtates generally, that the caſe then before the court, was an action of treſpaſs, in which a perſon having a right and having peaceably exerted it, may plead, that the land on which he entered was his own; but if he aſſert that right by force, it becomes the ſubject of a criminal proſecution, which was the caſe in *Shower*, a proceeding under the ſtatute for a forcible entry. If this caſe in *Shower*, which lays it down, that the ſheriff, having ſold 3 *T. Rep.* 292. *H. Bla.* 555. *Rex v. Deane, et al.* 2 *Shew.* 85.

1794. a term, on a *fieri facias*, cannot, and muſt not, put the perſon out of poſſeſſion, and the vendee in; but the vendee muſt bring his ejectment, had not been conſidered, by the chief juſtice, as applicable to a tenant in poſſeſſion defendant, and as good law; why ſhould he have given himſelf the trouble of diſtinguiſhing that caſe from the caſe before him, in theſe points, that the entry in the one caſe was peaceable, in the other forcible, and that the one was a civil action, the other a criminal proſecution. *Buller*, after expreſſing the inclination of his thought, on a mere ſpeculative point, not within the caſe before him, declares, that he gives no opinion.—*Kenyon*, at the ſame time, ſeems to recognize the caſe in *Shower*, and that caſe is contrary to the inclination of *Buller's* thoughts. The caſe in *Shower* ſeems to be recognized by the general current of *Engliſh* law authorities; and, ſuppoſing a term and a fee, in this reſpect, ſimilar, is the caſe before us. Whether, therefore, are we to take for law the ſolitary, extra-judicial, unpremeditated, and unrelied on, opinion of a ſingle, though highly reſpectable, judge; or a decided caſe, countenanced by the general weight of authority, and introduced into all the ſubſequent ſyſtems, as an eſtabliſhed point of law? No doubt, the defendants, coming with the ſheriff at his requeſt, are exactly in his ſituation, and, if he be juſtifiable, they are. If a ſheriff has authority to give poſſeſſion, he muſt have authority to do it by force. The caſe in *Shower* ſays, he has no ſuch authority.

If the ſuggeſtion of juſtice *Buller* can be reconciled with the caſe in *Shower*, it will be a more reſpectful attempt to reconcile them, than to ſet them in oppoſition. Both the caſe in *Shower*, and the caſe before us, are of a ſheriff's giving poſſeſſion after a ſale. Juſtice *Buller* ſays, that the ſheriff, having ſold is *functus officio:* can this mean any thing, but that his authority over the premiſes is expired? I ſhould pay but a poor compliment to the judgment of juſtice *Buller*, to conſider him as ſaying, that a ſheriff has authority to act, after he has ſaid, that his authority is expired. He does not ſay, that a ſheriff *functus officio* can turn out a tenant by force, nor that a *purchaſer* at ſheriff's ſale can turn out a tenant by force (I ſuppoſe always the tenant to be the de-

fendant in the judgment); and unleſs he ſays one or other of theſe, he comes not up to the caſe before us. He certainly would appear more conſiſtent with himſelf, if we conſider the authority he attributes to the ſheriff, of turning out the tenant, as exerted, at the time of the ſeizure under the *fieri facias*, than as exerted after the ſale. Let us ſee whether there be not ſomething in the method of proceeding in *England* to the ſale of a term, that will render this conſtruction of juſtice *Buller's* opinion more probable, than it would be, if it were to be applied to the method of proceeding to the ſale of a fee ſimple eſtate under our act of aſſembly. In *England*, a term is ſold, becauſe it is a chattel. Immediately after receiving the *fieri facias*, the ſheriff may ſeize the term, and, without delay, proceed to ſell it, as he would proceed to ſell goods. The diſtance of time, between the ſeiſure and ſale, may be ſo inconſiderable, that it is almoſt the ſame thing to the tenant, whether he is turned out at the ſeiſure, or at the ſale. In *Pennſylvania*, the ſheriff, having received a *fieri facias*, and ſeiſed lands, muſt ſummon an inqueſt, and return the whole proceedings to the next court; and cannot proceed to ſell, till, after this return, he has received a *venditioni exponas*; and, inſtead of ſeveral days, ſeveral months, muſt intervene between the ſeiſure and the ſale. It might be probable, therefore, that juſtice *Buller* would ſay, turn out the tenant, at the ſeiſure; when, if between that and the ſale, ſuch time intervened, as in *Pennſylvania* intervenes, he would not have ſaid ſo: when perhaps the ſeiſure might be juſt before harveſt, and the crop to be then ſevered might go far to pay the debt. 1794.

In *England*, nothing but chattels can be ſeiſed on a *fieri facias*. It has been held, that a bargain of ſale of chattels is incomplete, without delivery. Any aſſignment of chattels, unleſs poſſeſſion accompany it, is, as againſt third perſons intereſted, held fraudulent and void; becauſe poſſeſſion remaining in the aſſignor, gives him a falſe credit, and enables him to impoſe upon others.—This is not the caſe with reſpect to land; for poſſeſſion of it is not conſidered as evidence of right or title in it: this depends on the deeds, by which it is transferred from one to another. But as leaſes of land are conſidered as chattels, they have, in this reſpect, been ſubjected to the

1794. regulations of other chattels; and a conveyance of a leaſe for years, unattended with poſſeſſion, has been held fraudulent. Conſidering a ſeiſure in execution, as but a form of aſſignment, the ſame principles, for the prevention of fraud, have been applied to chattels taken in execution, and left in the poſſeſſion of the owner: for theſe have been conſidered as ſubject to a ſecond execution, at the ſuit of another perſon. It appears, therefore, that it muſt be uſual in *England*, for ſheriffs to take poſſeſſion of the chattels, which they ſeiſe in execution, or to leave ſome perſon in poſſeſſion of them, in their name.

Bull. Nr. 213. 2 *T. Rep.* 591—5. 1 *Wils.* 44. 1 *L. Ray* 251. 1 *Wils.* 44. *Reed v. Harriſon*, 2 *Bla.* 1218.

To me theſe circumſtances appear to add conſiderable weight to the conſtruction, which I have ſuggeſted, of the inclination of juſtice *Buller's* thoughts on the power of a ſheriff, to turn out the tenant of a leaſe. But neither theſe circumſtances, nor this conſtruction will juſtify the defendants in the preſent caſe. If the meaning of juſtice *Buller* was, that the ſheriff, who could turn out a tenant, muſt be one not *functus officio*, the ſheriff muſt turn out the tenant at the time of the ſeiſure, or before the ſale. If the turning out of the tenant be neceſſary, to prevent his poſſeſſion from being evidence of fraud, in the caſe of a leaſe; that is not neceſſary in the caſe of a fee-ſimple. And, although this manner of turning out a tenant of a leaſe, which could be ſold with all the ſummary diligence of a chattel, might be little or no inconvenience; yet this manner of turning out a tenant in fee-ſimple, the ſale of whoſe intereſt muſt proceed with all the ſlow ſolemnity of our act of aſſembly, might be a great inconvenience.

2. If, therefore, the weight of juſtice *Buller's* opinion will not juſtify the preſent defendants, they muſt reſort to the ſecond point; the terms and intent of our acts of aſſembly, for ſeizing in execution, and ſelling real eſtates.

1 *St. L.* 12. The firſt act provides, to the end that no creditors be defrauded of the juſt debts, due to them by perſons who have ſufficient real eſtates, if not perſonal, to ſatisfy the ſame; that all lands and houſes ſhall be liable to ſale on judgment and execution, under certain regulations; and the ſheriff ſhall ſell and convey the ſame, under his hand and ſeal. After which, ſuch lands and houſes ſhall be and remain a free and clear eſtate to the purchaſer,

his heirs and affigns, as fully as they were to the debtor. The ſecond act, with the ſame end in view, provides, that lands ſhall be liable to be *ſeized* and ſold, upon judgment and execution obtained. The ſheriff is directed to give the buyer a deed duly acknowledged in court. If the profits of the lands will, in ſeven years, pay the debt, the lands ſhall be *delivered* to the creditor, until the debt be levied by a reaſonable extent, in the ſame manner, as lands are delivered on writs of *elegit* in *England*. If the profits be not ſufficient, in ſeven years, to pay the debt, a *venditioni exponas* iſſues, empowering the ſheriff to ſell. And all other lands are to be *ſeized and taken* by a writ of *levari facias*, and ſold, either with or without a *venditioni exponas*: or, if no buyer appear, are to be *delivered*, on a *liberari facias*, at the valuation of twelve men, to the creditor, as his free tenement.—The perſons, to whom the lands are thus ſold or delivered, their heirs and aſſigns, ſhall hold them, as fully, and for ſuch eſtate, as the debtor did or might do, before the taking thereof in execution. 1794. 1 St. L. 67.

In this, I can ſee nothing provided for, but the ſale of lands for the payment of debts. And, as it is compulſory, the ſheriff is made the organ of conveyance, inſtead of the owner. His whole proceeding is a legal conveyance, and, like any other legal conveyance, transfers, to the purchaſer, all the eſtate of him, for whoſe debt it was ſold. But there is nothing in this act, which ſays, that the purchaſer from the ſheriff is to obtain poſſeſſion in any other way, than a purchaſer from the owner, peaceably or by conſent.

It may be ſaid, that the direction to the ſheriff to *ſeize*, and, in ſome caſes, to *deliver*, implies an authority to turn out the poſſeſſor, and put the purchaſer in poſſeſſion. But let it be remembered, that this ſeizure, if it mean a turning out of the owner, is when the execution is laid on the land, and before the ſale; and that, even when the ſheriff has ſeized, he is to deliver to the creditor, in the ſame manner as lands are delivered on writs of *elegit* in *England*; which ſeems to be little more, than a ſheriff's deed *ſub modo*, or an authority to enter; and, on this delivery, the creditor muſt bring an ejectment. *Taylor v. Alexander, Dougl.* 486. 4 *Mod.* 42. 1 *Comyn's Pract.* 363.

1794. Let us bear in mind, that our act of aſſembly was about to make a very material change in the principles of common law, and to declare, that lands ſhould be ſold for the payment of debts. The aſſembly knew, that, by the principles then governing real eſtates, lands could not be ſold; and they knew that leaſes could be ſold; yet they did not declare, that lands ſhould be ſold in the ſame manner as leaſes. The aſſembly knew, that on a *fieri facias* againſt a tenant of a leaſe, a ſheriff could not turn this tenant out of poſſeſſion, and put the vendee in; or, at leaſt, they did not know, that he could; for no inſtance of the kind had ever been known to have happened, or if it happened, it had been judicially condemned; and yet they did not declare, that he ſhould have this power, nor preſcribe the manner in which it ſhould be exerciſed. Can we ſuppoſe, that they would not have done ſo, if they had intended to do it? It is ſaid, that, by ſubjecting lands to be ſold for debts, they made them chattels. This is a looſe way of ſpeaking. It is plain, that they did not make them ſaleable as chattels; for they have preſcribed a particular manner of proceeding. And though this manner is preſcribed at conſiderable length, and with ſufficient minuteneſs, not a word is ſaid of the ſheriff's giving poſſeſſion. If, independent of giving poſſeſſion, there was a new object of ſufficient importance provided for by this legiſlative act; I cannot, from any thing, which they have ſaid, infer a new authority of giving poſſeſſion: nor do I think myſelf warranted to ſupply their ſilence. Without ſuppoſing a new power of giving poſſeſſion, of which nothing is ſaid, there was a new object, of ſufficient importance, provided for by this legiſlative act, an aſſignment or conveyance, under certain qualifications, of the right of the whole lands of a debtor. As, before this act of aſſembly, a creditor had a right to the enjoyment of half the lands of a debtor, until, out of this enjoyment, he ſhould be paid. So, in the manner pointed out by the act of aſſembly, he could acquire a right to the enjoyment of the whole of his debtor's land forever. But to enter on this enjoyment, and unite poſſeſſion to his right, no new method is pointed out. What then is a court of law to infer, but that he muſt purſue that method, for this enlarged remedy, which, before, he could

purſue for an inferior one, and proſecuting this, like any other, right of land, bring an ejectment. 1794.

3. Of the principles of *Engliſh* law, I know nothing ſo favourable to the preſent defendants, as the inclination of juſtice *Buller's* opinion, ſo much relied on. But if, on the principles of *Engliſh* law, and on the conſtruction of our acts of aſſembly, the defendants are not juſtifiable, I know not to what principles we ſhall reſort, on the ground of general convenience. On the ſubject of the preſent diſcuſſion, all the relaxations of common law ſeverity have been made by the legiſlature. The legiſlature of this ſtate have applied their attention to this ſubject, and, greatly to their honour, extended it beyond the narrow limits, to which it had been confined. We find nothing in the ſolemn act of this extenſion, which can inform us, that they intended to go farther than a transference of a right. Shall we, on a ſubject on which they have expreſſed their mind, take upon us to declare, that they intended to go farther, than their expreſſion bears?

That an honeſt man, who, for a full price, purchaſes, at public ſale, a tract of land, ſhould, afterwards, find himſelf involved in a law-ſuit, to obtain the benefit of his purchaſe, is indeed an evil, which requires redreſs. But the legiſlature, with this evil under their contemplation, did not redreſs it. Will it be preſumed, that, becauſe they did not, we muſt? As the evil was known to exiſt in *Pennſylvania*, unremedied, either by the legiſlature, or by courts of juſtice, it is to be preſumed, that purchaſers at ſheriff's ſales reckoned upon it in their bargain, and diminiſhed their price, in proportion to the trouble they expected to meet with, in obtaining poſſeſſion. Where this is the caſe, the real loſs generally falls, where it ought to fall, on the obſtinate owner, who continues in poſſeſſion, after his right has ceaſed. Whether this has been the caſe, in the preſent inſtance, or not, is no reaſon for us to aſſume an authority, which is not given to us, and authorize a ſheriff to do that, which law has not authorized him to do. It is better that an individual ſuffer, than that a general line of duty be broken through. It is better, that the evil exiſt, for ſome little time (I hope it will be but a little time)

1794. longer, than that its correction ſhould come from an improper ſource. Great inconvenience would enſue, if the tenant were turned out at the ſeizure, under the *fieri facias:* and, to turn him out after the ſale, appears to me to want the ſolemnity of judicial authority. The owner of chattels may ſeize them at any time: but the law has reſtricted the owner of land to a peaceable ſeizure. Great inconvenience might follow from a looſe unguarded authority of turning out by force, perhaps inſtantaneouſly. Some precautions muſt be adopted for the due exerciſe of this power. None have yet been laid down by courts; for the exerciſe of it was never, that I have heard of, within their contemplation. To ſanction it, without previous precaution, appears dangerous. When the legiſlature ſhall take the ſubject into conſideration, they can lay down rules for proceeding in it. Until then, we believe, the evil muſt be ſuffered to exiſt, or find its remedy in the prudence of the parties. This is not an action of treſpaſs, where right would juſtify the entry, and the taking and detaining of the poſſeſſion. It is an indictment for a forcible entry into lands, and expulſion of the tenant, when there was no direct legal warrant for making the expulſion. This is an offence puniſhable by indictment. There muſt therefore be judgment for the Commonwealth; and reſtitution muſt be awarded.

WESTMORELAND COUNTY,

March Term, 1794.

Jacob Macklin *v.* Robert Taylor.

See the caſe of Lea v. Little, ante p. 192, and of Huſton v. Ayres, poſt. 1 St. L. 36, 246. 1 St. L. 604.

THE defendant, a juſtice of the peace, having, without the conſent of the plaintiff, her father, married his daughter to *Enoch Varnum*; the plaintiff brought an action of debt, on the act of aſſembly for the penalty of 50*l.* The writ was returnable to *March* term, 1793. Written notice of the action to the juſtice was proved.

The daughter and *Varnum* came to *Taylor's* houſe, a little after midnight, on *Monday* morning, in *December* 1792, and were there married by him. She was then ſixteen years and a half old, and lived in her father's houſe. *Taylor* aſked them why they had not her father's conſent. They ſaid, they were in ſuch circumſtances, that it was not proper to have made public. 1794.

Roſs, for the defendant, offered to prove, that the girl told the juſtice, that ſhe was pregnant, and that *Varnum* was father of the child with which ſhe was pregnant, and that her pregnancy could no longer be concealed, and to prove, that, in ſuch caſes, the conſtant practice had been for juſtices to marry the parties.

PRESIDENT. The teſtimony is altogether impertinent, and ought not to be admitted. Theſe circumſtances are proper for the conſideration of the father; and, no doubt, would always be duly weighed by him. But to ſuffer them to be given in evidence, as a juſtification of the juſtice, would be transferring to juſtices, that parental control over young women, which policy and nature have reſerved to parents. As to the practice, it, being clearly unlawful, can be no juſtification.

Roſs, then contended, that, by analogy to the caſe of ſuits by huſbands againſt other men, for criminal converſation with their wives, and, *a fortiori*, this being a penal action, it muſt be proved by the proſecutor, that his daughter is legitimate, or he muſt be nonſuited.

Young, for the plaintiff, read 3 *Bla. Comm.* 139, 140. No body doubts of the marriage of the parents of this woman. But we will not offer proof, that is not neceſſary.

PRESIDENT. The analogy ſtated by Mr. *Roſs*, is incomplete. There is no legal tie between a man and a woman cohabiting without marriage; and he has no more legal right to ſleep with her, than any other man, who may procure her conſent. Their cohabitation is an offence; and, from this offence he ſhall derive no rights or profit. But though the begetting of a baſtard daughter be an offence, the maintenance, education, and protection of her is a duty; and the rights ariſing from this duty ought not to be curtailed. Common ſenſe requires this, with a force that there is no legal diſtinc-

1794. tion to reſiſt. And if the putative or natural father can be comprehended within the word *parent*, which is the word uſed by this act of aſſembly, he ought to be intitled to the penalty for this offence. We think he may be ſo comprehended. And I will ſtate an analogy more accurate, and juſtifying our opinion. The act of parliament, to prevent the carrying away and marrying young women without conſent of their parents, or thoſe who have the keeping of them, impoſes a puniſhment by fine or impriſonment. And on this act, the court of King's Bench granted an information for taking away a natural daughter, under the care of her putative father. So the caſe of illegitimate children has been held to be within the miſchiefs to be remedied by the *Engliſh* marriage act. We therefore hold, that it is unneceſſary to prove the marriage of the parents, or the legitimacy of the daughter; but if Mr. *Roſs* deſire it, we will reſerve the point, that he may, if he pleaſe, argue it again.

1 *St. L.* 247.

4 & 5, *P.* & *M. c.* 8. 4 *Comm.* 208. 4 *Reeve* 491-2.

Rex v. Cornforth, et al. 2 *Str.* 1162.

Rex v. Hodnett, 1 *T. Rep.* 96.

Roſs then argued to the jury, that, when fathers withhold their conſent unreaſonably, juries ought to weigh the caſe, and might give leſs than 50*l.*

PRESIDENT. If parents are unreaſonable, the law provides a method of marrying without their conſent, viz. according to the forms of their church. If juries can give leſs, they may give more, than 50*l.*; but to give either leſs or more, would be making a new law, which neither courts nor juries can do. There is no doubt in this caſe; and the verdict muſt be for the plaintiff for 50*l.* preciſely.

The jury found for the plaintiff 50*l.* debt with 6*d* damages and 6*d.* coſts.

No motion was made to ſet this verdict aſide; and, at another term, there was judgment on it.

ALLEGHENY COUNTY,

June Term, 1794.

GEORGE BOWERS *v.* EDWARD FITZRANDOLPH.

1794.

BOWERS brought an action of *treſpaſs vi et armis*, againſt *Fitzrandolph*, for killing his dog. The dog had bit *Fitzrandolph*, who, a few minutes after, ſeeing the dog again, ſhot him. There was alſo ſome ſlight grounds to excite a ſuſpicion, that the dog was mad.

PRESIDENT. Whether the dog was mad or not, he having bitten *Fitzrandolph*, the killing of him is juſtifiable. The dog was a nuiſance: and every man may abate a nuiſance. This is not the caſe of a dog ſet to guard property, and killed by a perſon interfering improperly. Such killing would not be juſtifiable.

The jury found a verdict for the defendant.

JOHN MARIE *v.* SAMUEL SEMPLE.

SAMUEL SEMPLE had cleared, fenced, and, for ſeveral years, occupied a piece of ground, in the manor of *Pittſburgh*; but neglecting to take out a title for it, *John Marie* purchaſed it from the proprietaries; brought an ejectment againſt *Semple*, for it, and obtained poſſeſſion; and now brought treſpaſs for *meſne* profits. Evidence of *Semple's* clearing and improving the land was objected to.

PRESIDENT. The plain principles of right and wrong ſeem ſtrongly to point out, that *Marie* ought not to put money in his pocket from the labour of *Semple*. The proprietaries permitted people to ſettle on their lands, on the preſumption, that they would afterwards buy, and they gave a preference to the ſettler. We are inclined to admit proof, by *Semple*, that, when the land was recovered, it was in a better ſtate by his labour,

1794. than when he went on it. Againſt this, let *Marie* ſhew the advantage which *Semple* received from the occupation, and, if any, the injury, which he may have done to it. Let the proof therefore be admitted; but, if the plaintiff's counſel chooſe to argue it again, we will reſerve this point.

The jury found a verdict for one dollar damages.—And the counſel for the plaintiff being ſatisfied with it, there was judgment on this verdict.

WESTMORELAND COUNTY.

June Term, 1794.

Leſſee of SAMUEL DIXON *v.* SAMUEL MOREHEAD.

AT the trial of an ejectment for 317 acres of land, in *Armſtrong* townſhip, the plaintiff produced an application, No. 588, dated 3d *April*, 1769, in name of *David M'Crory*, for 300 acres, on a run emptying into *Blacklick* creek, five or ſix miles above the *Blacklick*, on the weſt ſide of ſaid creek; and a ſurvey of 317 acres, made 22d *April*, 1773, deſcribed as in the location; and a conveyance of the ſame land, in fee-ſimple, from *David M'Crory* to *Samuel Dixon*, dated 3d *July*, 1772.

The defendant ſhewed a warrant, dated 24th *January*, 1785, in name of *Samuel Morehead*, the younger, for 300 acres of land, including his improvement, on *Twolick* creek, and the mouth of *Stoney* run, adjoining land of *John Pumroy*, in *Armſtrong* townſhip, *Weſtmoreland* county, charging intereſt from 1ſt *March*, 1771; and a ſurvey of 295½ acres made on this warrant. He ſhewed alſo an ejectment brought by him, in this county court, for this land, againſt the preſent plaintiff, of *January* term, 1774; and a verdict and judgment for him, of *October* term, 1785. But this verdict ſeemed to have been without any examination of *Dixon's* title; and it ſeemed alſo to have been in his abſence. *Morehead* now

alſo ſhewed a written award in his favour, by four of five arbitrators, to whom, or a majority of them, there was a ſubmiſſion by the parties of their diſpute reſpecting this land. The opinion of the fifth arbitrator was in favour of *Dixon*. This award was made in the preſence of both parties, and after examination of their evidence of title. 1794.

The ſurvey made on *M'Crory's* application correſponded to the deſcription. The creek, in 1769, and for about four years afterwards, was called *Blacklick*; but, from that time, it was called *Twolick*. In *July* or *Auguſt*, 1773, *Dixon* had built a cabbin on this land. In *December*, 1772, *Morehead* went to *improve* on this land, with a view to hold it, and to build a mill, on a mill-ſeat, at the mouth of the run; built a cabbin, but did not cover it. And, in *May*, 1773, he plowed ground for a garden, and planted potatoes. This was cloſe by where *Dixon* afterwards built his cabbin. In the fall of 1773, *Morehead* lived with his family in *Dixon's* cabbin. In 1774, or 1775, *Morehead* had a field cleared, and built a mill, which was going in 1775, and was burnt by the *Indians* in 1778; ſince which time, the land has been vacant. The cabbin built by *Morehead*, in *December*, 1772, was 248 perches from *Dixon's* cabbin, was not included in *Dixon's* ſurvey, and had good land all round it.

Brackenridge, for the defendant, reſted chiefly on the ſettlement made by *Morehead*, and on the award in his favour.

Woods, for the plaintiff, referred to the act for opening the Land-Office in 1784, and to the preamble to the opening of the Land-Office in 1769, and contended that improvements, ſince the purchaſe of 1768, gave no title, and that no title could be obtained till 1784.

PRESIDENT. The act of aſſembly of 1786, continued by ſubſequent laws, *now* protects ſettlements or farms againſt any adverſe title by warrant. Even before this law, it had been conſidered, in the general opinion of this country, that, by *general uſage*, and a kind of *common law*, they were protected. Some deciſions, ſince the laſt war, contradicting this general opinion, uſage, or common law, the act of 1786 was thought neceſſary. And ſubſequent deciſions have re-eſtabliſhed the ſame principles, even with reſpect to titles previous to the act. But, 30th *December*.

1794. both under that act, and the late decisions, it is an *actual settlement* or *farm*, that is protected, not a mere *improvement*, as it is called. The same idea is held out, in the preamble to opening the Land-Office, on 3d *April*, 1769, and in the 8th and 9th sections of the act of 3d *April*, 1792, for the sale of vacant lands within this Commonwealth. So that from the 3d *April*, 1769, to the 3d *April*, 1792, and to the last decisions of the judges; it appears to have been the prevailing and recognized opinion of legislators, judges, and proprietors, that no warrant or paper title is valid, as against a prior *actual settlement* or *farm*. But no act of the proprietors, no law or decision, has ever yet said, that what is called an *improvement* is protected.

The paper title of the plaintiff was clearly appropriated to this land, on the 22d *April*, 1773, by a survey of land corresponding to the description of the application. At that time, nothing on the part of the defendant, appeared on the land tending to a *settlement*, but a cabbin, built in *December*, 1772, unfinished, uncovered, and not included in the plaintiff's survey. This surely will not amount to what legislators, judges, or proprietors, have called an *actual settlement*. It amounts only to what is called an *improvement*, and what none have protected.

No attempt, to convert this improvement into an actual settlement, is made by *Morehead*, till *May*, 1773, after *Dixon* had, by his survey, appropriated this land to himself. Then, and knowing of this survey, he plows a small piece of ground, and plants potatoes in it. Soon after, in *July* or *August*, 1773, *Dixon* builds a cabbin, into which *Morehead* afterwards enters, lives in it in 1774, with his family. In 1775, he builds a mill.

If there had been a settlement by *Morehead*, at the time of *Dixon's* survey, leaving it out of the survey would not be sufficient. I should think the settler intitled to the usual quantity of land, contiguous to his settlement, and within his claim, though included in the adverse survey.

I have considered the plaintiff's title as attaching to this land, only at the time of his survey, on 22d *April*, 1773; because his location is not precisely definite; and because it is not necessary to carry it farther back, since

the defendant's actual ſettlement does not ſeem to have exiſted till in 1774. 1794.

My idea is, that if a man makes a *ſettlement* or *farm*, on land before a paper title is attached to it; he ought to be protected. But if he make only what is called an *improvement*, he may as well loſe this, as his adverſary loſe his office or paper title. If a paper title ought to yield to a *ſettlement*, *an improvement* ought to yield to a paper title.

It is pity, that any land ſhould be conſidered as ſold or appropriated, before it is ſurveyed.

One verdict in ejectment is not concluſive; and the former trial between theſe parties, ſeems to have been without any diſcloſure of the merits. A verdict in ejectment intitles only to poſſeſſion, and does not determine the right.

The principal difficulty in this caſe ſeems to be in the award. In what light are we to conſider it? If we conſider it as an agreement of the parties, and apply to it the rule in equity, that what ought to be done is conſidered as done, it would operate as a title againſt the plaintiff. If we conſider it only as a verdict in ejectment, it is no bar to a further proſecution of the title: and, as to title, the *Engliſh* law ſays, an award is not concluſive. I am therefore, diſpoſed to think, that it ſhould have no greater force, than a verdict and judgment in ejectment. 1 *Bac. abr.* 132, 133, 140. 3 *Comm.* 16.

The jury found a verdict for the plaintiff.

On the motion of Mr. *Brackenridge*, there was a rule to ſhew cauſe why this verdict ſhould not be ſet aſide, and a new trial granted.

At *September* term, 1795, the motion for the new trial was argued.

Brackenridge, for the new trial. The ſubmiſſion and award concluded the parties; and ſo the court ought to have directed the jury: whereas the court ſtated, that it ſhould have but the effect of a verdict in ejectment.—Award on ſubmiſſion amounts to a contract with ſufficient conſideration. And a conſideration need not be expreſſed, if it be implied in the tranſaction. I conſider the caſe of *Penn v.* lord *Baltimore* as deciſive of the preſent caſe; for if the court of Chancery carry an award into execution, a jury will, 1 *Powel Contr.* 330, 342, 344, 368. 2 *Powel Contr.* 7-10.

1794. The diſtinction between awards of real property, and of perſonal, ariſing only from feudal principles, exiſts
3 Comm. 16. not in *Pennſylvania*; and even in *England*, is reduced to a mere point of form. Improvement-rights to land paſs by parole, like chattels. Whether it be a real or a perſonal eſtate, therefore, in *Pennſylvania*, an award of land is good.

The end of a reference is to ſettle amicably what cannot be ſo well ſettled in a court. It entirely defeats this end to give an award no greater effect than a verdict. It is the general opinion, that awards are final, and the general intereſt, that they ſhould be ſo. The people know no diſtinction between awards of real and of perſonal property: and we ought to take their contracts as they underſtand them; eſpecially as this is for their benefit.

Taking it either as an award or as a contract, the jury ought to have been directed to conſider it as equivalent to a deed of the party under hand and ſeal.

3 Comm. 16, 17. *Roſs*, againſt the new trial. The point in *Blackſtone* is not, that an award is not final, but that an award will not paſs real eſtate. There is good reaſon why an award of perſonal eſtate ſhould be final, becauſe a verdict is final. But the whole analogy of the law is, that a verdict, though in a writ of right it is, in an action for the poſſeſſion of land is not final. Why then ſhould an award be final?

Execution goes out on a report of referees, as on a verdict, except where, as here, a ſpecific thing is awarded. Had this been a reference by rule of court, in ejectment, it would only have given the poſſeſſion, and could not have prevented another ejectment.

Unpatented lands, held by location, warrant, or ſurvey, are always conſidered as real eſtate. Dower will lie of them; yet the plea is ſeizin or not. This is a caſe of land held by location and ſurvey.

2 Powel Contr. 7, 10. The caſe of *Penn v.* lord *Baltimore* proves, that an award is not final, for there was a neceſſity to file a bill for a ſpecific performance. Why this, if an award be a conveyance?

2 St. L. Our act of aſſembly makes an award but as a verdict. However this is not an award: for the ſubmiſſion was to five; and the award ſtates, that there was one diſſentient voice. The award is on a parole ſubmiſſion to

five, was assented to only by four, and ought not to have been read to the jury. Had it been perfect, it could have no other effect than a verdict. 1794.

In *M'Kee* assignee of *Berrickman v. M'Clure*, tried in the court of Common Pleas of *Allegheny* county, the president considered an award as not final, and left it to the jury, who found against it. In *Estep v. Wallace*, at a court of Nisi Prius in *Washington* county, the chief justice left an award to the jury, who found against it. In *Howard v. Pollock*, at Nisi Prius, in *Washington* county, an award, on an arbitration bond of submission to five, signed only by three, was not suffered to be read to the jury. *March Term*, 1792. *May*, 1792. *M'Kean C. J.* and *Yates J.* *May*, 1795. *M'Kean C. J.* and *Yates J.*

We have certificates of two of the referees or arbitrators, that their intention was, that the award should have no other effect, than a verdict in ejectment; that, before they gave their award, it was proposed by one of the referees, that the parties should be bound to stand to it; and they objected to this, and it seemed to be dropped.

Brackenridge in reply. The court of Chancery only established the evidence of *William Penn's* title. That case is altogether with me. Chancery will decree a conveyance on any act *en pais*, which will be a ground of it, considering that as tantamount to livery and seizin.

Our act of assembly is in imitation of the act of parliament 9 and 10 *William* 3, and meant the same thing and no more. A report or award is only examinable, as to corruption or misbehaviour of arbitrators or parties. 1 *St. L.* 3 *Comm.* 17.

The general understanding of submissions is that the award of a majority is sufficient. The choice of an odd number is to prevent the embarrassment arising from an equal division, and secure an end of the controversy.—There was evidence that the submission was to five, or a majority of them.

It would have been foolish to have inserted in the award, that it should be final; and this proposal was judiciously rejected. The arbitrators were only to make an award, not to declare its validity or effect. It is immaterial what they thought as to this. The parties meant it to be final. The law makes it so.

At *December* term, 1795, the opinion of the court was delivered.

1794. PRESIDENT. In the trial of this ejectment, at *June* term, 1794, the defendant gave evidence, that he and the plaintiff, had, before the commencement of the action, submitted their dispute, about the right of the land in question, to five arbitrators or a majority of them; and that four of the five had awarded in favour of him, the fifth only being in favour of the plaintiff's title.—In the direction to the jury, I told them, that, considering this award as giving the right, it could not have this effect, for, by the law of *England*, title to real estate cannot be transferred by award; and, considering it as giving the possession, it was not decisive, for one judgment in ejectment is no bar to another ejectment for the same land.

A verdict having been given for the plaintiff, a motion has been made, to set it aside, on the ground, that the jury ought to have been directed to consider the award as decisive of the right of these parties to this land.

Disputes about property may be terminated, and the right transferred from one of the contending parties to the other, by consent, by compulsion, or by a combination of both. It is by consent, when one agrees to give, and the other to accept, something else, in lieu of the property in dispute. It is by compulsion, when one obtains process and sentence of a competent court of justice against the other. And it seems to be a combination of both, when, unable to settle the dispute themselves, they refer it to others, to whose opinion they bind themselves to submit. Whichever of these methods be adopted, whether contract, judgment, or award, the dispute is thereby settled, and the right ascertained.

1 *Powel Contr.* 318-9, 1 *Bac. abr.* 132 -4. 1 *Att.* 64. 1 *Comm.* 16. 4 *Vesey, jr.* 365-70. 1 *Com. Dig.* 301. 2 *Eq. Ca. Abr.* 80. *Vinior's Ca.* 8 *Co.* 80. 1 *Salk.* 69, 76. 2 *L. Ray* 1340 *Woods Inst.* 548, 51. *Lofft.* 426. 3 *Comm.* 16.

An award is sometimes considered as a contract, sometimes as a judgment. And arbitrators are sometimes considered as the substitutes, and sometimes as the judges of the parties. They can do whatever the parties themselves can do, and more than courts can do. Their power is revocable, as a power of attorney; and, if not given by deed, no action lies for its revocation; for, as *ex nudo pacto*, so *ex nuda submissione, non oritur actio.*—The submission implies mutual promises to perform the award. The award is a contract, and is considered as similar to accord and satisfaction, and equal to the judgment of a court.

1794.

It is true, that the Supreme court of *Pennſylvania* has conſidered an award, as on a footing with a verdict, and equally under their control. But other deciſions in this ſtate, and the rules of the *Roman* and *Engliſh* law, viewing arbitrators as both judges and jury, have treated awards with higher reſpect. The courts, both of equity and law, have conſtantly refuſed to enter into the merits of the matter referred, or examine the juſtice and reaſonableneſs of the award; and have declared, that, the arbitrators being judges choſen by the parties themſelves, they cannot object to the award, as unreaſonable, or as a judgment againſt law: for they have referred their diſpute to the judgment of the arbitrators, and that would be a ground for ſetting aſide every award. Lord *Hardwicke* doubts whether an award, like a decree, can be ſet aſide, on the diſcovery of new evidence. And in a caſe in Chancery, of an account, which, after many errors had been aſſigned, and allowed by the maſter, having been referred to arbitrators, was reported a juſt account; lord *Thurlow*, though he expreſſed great ſurpriſe at the report, and ſpoke very hardly of it, added, that "the parties, by chooſing private judges, have placed it beyond the reach of any principle of law."—But though, when the parties themſelves chooſe their own judges, chancery will not generally relieve againſt the award; yet, where there is a reference, by order of that court, and the award appears unequitable, it will not be decreed. And, when the reference is to an arbitrator, to enquire into facts, he is in character of a maſter in Chancery, or a jury in a trial at common law; and the court is to draw the concluſion; or, if he does it, the court will ſee that he has drawn a right concluſion. And there are alſo many caſes, in which though the ſubmiſſion be general, and to arbitrators choſen by the parties, yet courts will hold the award as void. The grounds on which they will do this, appear either in the award itſelf, or in the parties, or in the arbitrators:*

Williams vs. Craig, Dall. 313. Hollingsworth v. Leiper. ib. 16. Winn. Juſt. Inſt 612, 710. Woods' Inſt. Civ. law 389. Anderſon vs. Coxeter, 1 Str. 301. Lucas v. Wilſon, 2 Burr. 701. Herbert vs. Buckley. Ridgeway's ca. temp. L. Hardw. 296. 1 Atk. 64. 3 Atk. 529. Veſey jr. 370. Ridgeway's ca. temp. Ld. Hardw. 290. Price v. Williams. Veſey, jr. 365.

1 Eq. Ca. 50.

Veſey jr. 370.

1 Bac. abr. 134-5, 144-7. 1 Com. Dig. 3-9. 1 Eq. Ca. 50-1. 2 Eq. Ca. 80-1.

* In an action at law on an award, evidence of partiality or corruption in the arbitrators was refuſed, as affecting third perſons, and as out of the award and the iſſue. The remedy for this was ſtated to be by action againſt the arbitrators, or by bill in equity to ſet aſide the award, where the arbitrators may be made parties, and may be made pay coſts. 2 *Wils.* 148—3 *Atk.* 396—2 *Veſey*, 316.

1794. as if the award be not final, or mutual, or be uncertain, abſurd, impoſſible, or unlawful; or be erroneous on the face of it; or if either of the parties, or rather, perhaps, if the party in whoſe favour the award is, has procured it by undue means, by fraud, or impoſition on the arbitrators or the other party; or where the arbitrators miſbehave themſelves, are partial, intereſted, or corrupt, or proceed irregularly, or on a plain and groſs miſtake, either in law or in fact. "But," ſays lord *Thurlow*, "in caſe of miſtake, it muſt be made out to the ſatisfaction of the arbitrator; and the party muſt convince him, that his judgment was influenced by that miſtake, and that, if it had not happened, he ſhould have made a different award."

1 *Salk.* 71-3. 1 *Atk.* 64. 3 *Comm.* 17. *Loft.* 554. 3 *Atk* 644. 2 *Vefey* 315. *Ridgeway s ca. temp. Ld. Hardw.* 196. *Vefey, jr.* 370.

Such ſeems to be the law of *England*, and, excepting the deciſion of the Supreme court already ſuggeſted, the law of *Pennſylvania*, reſpecting the effect of awards.—Under the regulations, which I have ſtated, awards ſeem generally to have been conſidered as a kind of judgments, given by private courts, conſtituted by the parties, and equally binding as a contract of the parties, or a judgment of a court of competent juriſdiction. Whether our act of aſſembly, by directing, that reports in references of cauſes depending, *being approved by the court, ſhould have the effect of verdicts*, meant to make ſuch reports liable to other exceptions, than thoſe allowed in *England*, reduce them to a footing with verdicts, and ſubject them to the ſame exceptions as verdicts are ſubject to; or meant only to ſubmit them to the ſame exceptions, as may be made to ſuch reports in *England*, and to give, to a judgment on a report, the ordinary proceſs after judgment on a verdict, inſtead of the proceſs of attachment uſed in *England*, was, before that deciſion in the Supreme court, I believe doubtful.

3 *Comm.* 16.

1 *St. L.*

I have hitherto had no occaſion to ſtate particularly the ſeveral kinds of awards, which exiſt in *England*;—becauſe I think the effect of each is the ſame, and their difference is in the remedies, or means of execution. I ſhall now however obſerve, that, in that country, there are three kinds of awards, two at common law, and one by ſtatute.

Lucas v. Wilſon. 2 *Burr.* 701.

1. At common law, the parties differing, may agree, either by word, or by writing ſealed or unſealed, to ſub-

mit their diſpute to arbitrators, without inſtituting any ſuit, and the award of the arbitrators binds the parties. If it be not obeyed by either party, the other has his remedy, by an action at law, either on the ſubmiſſion, or on the award. 1794.

2. Where the parties have inſtituted a ſuit, either at law or in equity, they may agree to withdraw the examination of it from the jury or the court, and ſubmit it to arbitrators, making this ſubmiſſion a rule of the court, where the cauſe is depending. The award, when made, is brought into the court, and, on the complaint of either party, if it has been improperly made, the court ſet it aſide, or, if no impropriety appear, compel obedience to it, by proceſs of attachment; diſobedience being a contempt of the rule made by the court.

3. From the experience of the uſe of theſe peaceable and domeſtic tribunals, a ſtatute enacted, that parties in any caſe, where the remedy is by perſonal action, or ſuit in equity, may, without any ſuch action or ſuit, ſubmit their difference to arbitration, and agree that ſuch ſubmiſſion be made a rule of any court of record, and this ſubmiſſion, having been made a rule of one of the courts, and the arbitrators having made their award, it is returned into the court of which the ſubmiſſion was made a rule, and, by that court, on the complaint of either party, within a limited time, annulled; or it is enforced, in the ſame manner as an award in a caſe where a cauſe was depending at the time of the ſubmiſſion. For this ſtatute is only declaratory of what the common law was before, in caſes where there was a cauſe depending, and was made to put ſubmiſſions, where there was no cauſe depending, on the ſame foot as thoſe, where there was a cauſe depending. 3 *Comm.* 17. 9, 10, *W.* 3. *c.* 15. 2 *Burr.* 701.

4. Our act of aſſembly, in caſes of mutual accounts, did not copy this *Engliſh* ſtatute, but introduced into *Pennſylvania* a fourth ſpecies of awards, which differs from the ſecond ſpecies before mentioned, in this, that the report, when approved by the court, is to be proceeded on, as a verdict, by judgment, and then by execution or *ſcire facias*, as the caſe may be, not by attachment; and according to the deciſion of the Supreme court, in this alſo, that it is open to the exceptions which may be made to a verdict. 1 *St. L.*

1794. Together with this, the firſt and ſecond kinds of awards muſt be conſidered as exiſting here, in full force; and theſe only: for the third ſpecies has never been introduced here.

Hilliard v. Craig, Dall. 313. With reſpect to the deciſion of the Supreme court, it will be ſufficient to obſerve, that this award is not of the ſame kind with that, on which that deciſion was made. That was of the fourth kind, under our act of aſſembly, on a reference of a cauſe then depending in court. The award, in the caſe before us, is of the firſt kind, at common law, and not under our act of aſſembly.

It was ſtated to the jury at the trial, and it muſt be repeated now, that though there have been awards in ejectment, and of leaſes, the poſſeſſion only, a ſort of chattel intereſt being in queſtion, and though if a conveyance of an eſtate in fee-ſimple be awarded, its refuſal is a breach of the arbitration bond; yet, a judgment in ejectment being no bar to another ejectment, and, by the law of *England*, an award being inſufficient to transfer the right to real eſtate; the award was not concluſive in this action. This, which was the principal difficulty at the trial, is the point now to be diſcuſſed. It has come before us in a ſhape, in which I have not obſerved it before, in any court; and, however unfurniſhed with guides and precedents, we muſt now examine and decide it.

Conſidering it as a principle of *Engliſh* law, that an award cannot transfer title to real eſtate, I do not ſee how, when an award was given as evidence of title to real eſtate, conſiſtently with that principle, any other direction could be given to the jury.

Penn. 18. The argument of the defendant's counſel encountered this difficulty, by urging, that the reaſon for refuſing to awards a binding force on real titles, having originated from feudal principles, to prevent colluſive alienations, without the conſent of the lord, does not exiſt in *Pennſylvania*; and, therefore, the diſtinction between awards of real and of perſonal property, will not be kept up.—That, even in *England*, this was reduced to a mere ſubtilty in point of form, and was eaſily evaded, by awarding a conveyance, which, if refuſed, can be compelled, by exacting the penalty of the arbitration bond; for, the refuſal being a breach of the award, the penalty can

be ſaved only by compliance. That an award was equivalent to an agreement; and that improvement titles, inchoate or imperfect titles, to land, were transferred by parole, like chattels. That the caſe of *Penn v.* lord *Baltimore*, is in point for the defendant here. And that any ſufficient act *en pais* will, in Chancery be conſidered as equivalent to livery and ſeiſin, and ground a decree of conveyance. Thus, whether as a contract or an award, the evidence was, in *Pennſylvania*, concluſive againſt the title of the plaintiff. 1794.

1. This argument gives up the defendant's caſe, if the *Engliſh* common law principles of awards of real property are binding here.

2. By relying on the caſe of *Penn v.* lord *Baltimore*, and the practice of the court of Chancery, it ſeems not to be wiſhed, that we ſhould go farther than the court of Chancery has gone, in like caſes.

3. Or ſome other principles muſt be eſtabliſhed, conformable to the ſtate of real titles in *Pennſylvania*.

1. As to the firſt, I repeat, that I cannot yet ſee how, on the principles of the common law of *England*, taking them as ſtated, the direction to the jury could have been otherwiſe than it was. But this ſubject will recur under the laſt head.

2. I am diſpoſed, in all poſſible and proper caſes, to adopt the rules of deciſion in the court of Chancery; and, in this caſe, to go as far, as any court of Chancery has ever gone. Courts of Chancery have, in many inſtances, decreed ſpecific performance of an award of title to real eſtate. But it muſt be obſerved, that, in all caſes, where they have done this, there has been an aſſent to the award, by the perſon againſt whom the decree was prayed, or an acceptance by him of ſomething under it, which is evidence of aſſent, or, with his connivance, or at his requeſt, a performance, or part performance, of it, by the other party. And lord *Hardwicke* expreſsly declares, that a bill, to carry an award into execution, where there is no acquieſcence in it by the parties, or agreement by them, afterwards, to have it executed, would certainly not lie. Conſidering that an award is as a contract, and that equity decrees a ſpecific performance of contracts, the beſt reaſon that I can ſee for the

Scott v. Wray 1 *Rep. Cha.* 84. *Bales v. Preſtor*, ib. 144 *Evans v. Cegan*, 2 *Wms.* 450. *Hall v. Hardy*, 3 *Wms.* 187. 1 *Eq. Ca.* 51. 2 *Eq. Ca.* 78-9. *Thomſon v. Noel.* 1 *Atk.* 62. 1 *Powel Contr.* 318-9.

1794. court of Chancery diſtinguiſhing between a contract made by the parties themſelves, and an award made by their ſubſtitutes, is this, that in contracts, the parties know the terms and extent of their engagement, when they enter into it; and it is, therefore, againſt conſcience to refuſe compliance. But, in awards, they know not the terms and extent of their engagement, which depend on the judgment of the arbitrators, and, as it may turn out harder, than the party intended, Chancery may refuſe to make performance a point of conſcience, and leave the perſon who complains of non-compliance, to his remedy at law.

1 *Veſey* 444. The caſe of *Penn v.* lord *Baltimore* is not in point, or, at leaſt, not concluſive. It is not the caſe of an award, *ib.* 445. but of an agreement in writing. One of the objections to the decree prayed for, in that caſe, was, that the articles were in the nature of ſubmiſſion to arbitration, which cannot be ſupplied by interpoſition and act of the *ib.* 450. court of Chancery. But ſaid lord *Hardwicke*, "the articles are not like ſubmiſſion to arbitration; for, in thoſe caſes generally, the time is conditional, ſo as determination be made by ſuch a day: but here the line and circle are agreed on. This is a particular, certain, ſpecific contract of the parties; nothing left to the *judgment* of the commiſſioners, who are merely *miniſterial*, to run the line, &c. according to the agreement."

3. If the argument for the defendant be not ſupported, on the rules, either of the common law, or of equity, it remains therefore to be conſidered, whether it can be ſupported on ſome other principles, conformable to the ſtate of real titles in *Pennſylvania*.

If the diſtinction between awards of real and of perſonal property reſted only on feudal principles, perhaps the maxim *ceſſante ratione, ceſſat et lex*, and a principle, which I think good, that we take not ſuch parts of the common law of *England*, as are incongruous to our circumſtances, might be a ſufficient anſwer to it.

1 *L. Ray* 115. But another ground is given for this diſtinction, to wit, that things in the realty cannot be recovered on an award. For, though arbitrators are in the room of parties, and act in their ſtead, and can do what they can do, 1 *Bac. abr.* 132 they can do no more; therefore an award cannot paſs corporeal inheritance, for the parties themſelves cannot

paſs that, without ſolemn livery. Yet this reaſon, comparing it to the authority of the parties, ſeems to admit, in ſubſtance, the authority of the arbitrators, over real eſtate, and to reduce the diſtinction, as *Blackſtone* ſays, to a mere form, by an alteration of which, the ſubſtance may be effected. For doubtleſs an arbitrator may award a conveyance or a releaſe of land; and it will be a breach of the arbitration bond, to refuſe compliance. In ſtrictneſs, therefore, the rule of the *Engliſh* law may amount only to this, that an award, of itſelf, does not operate as a conveyance of the land. And this perhaps is what chief juſtice *Treby* meant, when he ſaid, "that things in the realty might be ſubmitted, as well as things in the perſonalty; but they could not be recovered on the award." 1794.

3 *Comm.* 16. *Hunter v. Bannſon*, *Hardr.* 43.

1 *L. Ray* 115.

This, therefore, brings us to the conſideration of what intereſt the parties had, at the time of the award; and whether it be neceſſary that the award ſhould operate as a conveyance.

It is contended by the counſel for the defendant, that improvement rights paſs by parole, like chattels. I ſhould be unwilling to recogniſe this generally. It might affect creditors. It might lead to a concluſion, that ſuch rights are not bound by a judgment, and might be ſold on execution as chattels; or that a ſubſequent ſale, with delivery of poſſeſſion, might defeat a *bona fide* prior ſale by deed. I am not prepared to ſay, that this is law. I do not believe, that it is the received opinion. I think the practice of lawyers and others is contrary to this.

At the time of this award, *Morehead* was in poſſeſſion of the land. By *Dixon's* two ejectments againſt him, his poſſeſſion is admitted. He wanted nothing but title; and that was in the ſtate. *Dixon* could have deceived no man, on the credit of this land; and one ground for requiring ſolemnity of conveyance exiſts not here. Without determining, therefore, whether an improvement or location right be a real or a chattel intereſt, or whether any others than the parties would be bound by an award of it, let us ſee, whether, in this caſe, too little ſtreſs was not laid on the award in the direction to the jury.

The award is in *June*, 1791. *Dixon*, in virtue of his location, has a ſurvey made in *April*, 1773. *M*

1794. *head* has a warrant in *January*, 1785. Both therefore, at the time of the award, had a claim on the ſtate for a title. To ſettle the point between them, to whom the ſtate ſhould give the preference, they might enter into an agreement, and, though this were by parole, I think, the executive agents of the ſtate, and the courts of juſtice,* would hold it concluſive on them, or, at leaſt, on the party out of poſſeſſion; or they might ſubmit their difference to arbitration, and, I think, the executive agents of the ſtate, and the courts of juſtice ought to hold the award concluſive on them, or, at leaſt, on the party out of poſſeſſion. They have choſen their judges; judges tied down to no ſtrict or formal rules in reſtraint of juſtice; but veſted with ample powers for the moſt equitable redreſs to both parties. The authority of a tribunal of this kind ought not to be lightly impugned, nor its ſentence eaſily evaded. If the jury had been directed to conſider the award as concluſive, it would not have been ſo much a decree of a ſpecific performance of an award, as making it a bar to a further proſecution of the claim ſubmitted. It would not have been an *interference*, but a *refuſal*, to change the ſtate of things, and ſaying, they ſhould remain as they were.

I think, therefore, that, in the direction to the jury, ſufficient weight was not given to the award in this caſe; and, therefore, that there ought to be a new trial.—When I ſay ſo, I, at the ſame time, declare, that I do it with ſome anxiety; and I wiſh, for the ſettling of ſo important a point, that the next time this queſtion is diſcuſſed, it may be before judges, whoſe opinion will give more weight to the deciſion, than any judgment, that I can form.

It will be obſerved, that we do not take into view any opinion which the arbitrators may have entertained of the legal effect of their award. They were to give their judgment on the caſe ſubmitted. The operation or effect of their judgment is to be dictated by the law.

* Where a ſuit is depending for the title of land, the Board of Property will not iſſue a patent for it, till the ſuit is determined; and will then give a patent to the ſucceſsful party.

1794.

It will alſo be obſerved, that, though our opinion reſts on all the circumſtances of this caſe; yet, as in all caſes, a ſubmiſſion and award is a ſolemn tranſaction, and ought to mean ſomething; perhaps leſs than we have done would be making it mean nothing at all. The effect of an ejectment is known and ſettled, and no one is deceived by it.

NOTE.—Since the above opinion was delivered, I have ſeen the report of a caſe which was tried before lord *Kenyon* in *July*, 1795. It was an action on the caſe for unſkilfully navigating his barge on the river *Thames*, whereby the plaintiff's boat was ſunk. In opening for the plaintiff, his counſel ſtated that after the plaintiff had received the injury, the matter had been referred and an award made. Lord *Kenyon* ſaid he had ruled before that where parties had agreed to ſubmit their differences to any third perſon, and he had undertaken the buſineſs and made an award, the parties ſhould be bound by it; and that he who was diſſatisfied with the determination, ſhould not be allowed to have recourſe to an action; for that after taking his chance of having a determination in his favour he was then too late to recede from his engagement. If, however, there were any circumſtances attending the reference to ſuch third perſon which would be a ſufficient objection, in point of law, to an award, ſuch as partiality in the arbitrator, not hearing the party's witneſſes, &c. it ſhould be open for the parties in ſuch caſe to ſhew it at the trial.

The defendant failed in proving any circumſtance of this ſort, or non-acquieſcence to the reference which he alſo attempted to ſet up, and the plaintiff obtained a verdict, *Bailey v. Lechmere, Eſp. Rep.* 377.

The caſe of the leſſee of *Dixon v. Morehead* was tried at a court of Niſi Prius in *May*, 1798, before the Chief Juſtice and J. *Smith*, who held the award not binding, and the plaintiff's title regular and fair.

There was a verdict for the plaintiff.

PENNSYLVANIA *v.* JOSEPH CAMPBELL.

1794. CAMPBELL was indicted for ſtealing a fifty-dollar bank note, the property of *Daniel Proſſer*.

William Todd, having contracted with the Governor for making a certain diſtance of the ſtate road from *Philadelphia* to *Pittſburgh*, employed *Campbell* and *Proſſer*, to make the road in part of that diſtance; and advanced 60 dollars, viz. 10 ſilver dollars, and a 50-dollar bank bill. *Campbell* took up the bill, and *Proſſer* the ſilver; and they went to a neighbouring tavern, to get the bill changed for dollars, and then divide the whole money equally between them. Not getting the bill changed at the tavern, *Campbell* deſired *Proſſer* to give him the ſilver, and take the note to another tavern, on his way home, and there have it changed, and give him his ſhare afterwards. The note was then lying on the table with a paper in which it had been given them by *Todd*.—*Proſſer* gave *Campbell* the ſilver, and proceeded to take up the note. *Campbell* bade him ſtop till he folded it up. While *Campbell* was folding it up, *Proſſer* turned about to drink with ſome one in company. *Campbell* delivered the folded paper to *Proſſer*, who immediately put it in his pocket. When he opened the paper at home, there was no note in it. There was ſome evidence, that *Campbell*, folding and delivering the paper, retained a *dirty paper*; and that he, afterwards propoſed to pay *Proſſer* 30 dollars, on his return from *Philadelphia*, whither he was going, if *Proſſer* would ſwear, that he had loſt the note. This *Proſſer* refuſed to do.

Woods and *Young*, for the defendant. This can be no larceny; for there never was a poſſeſſion in *Proſſer*; and there was a joint property. Suppoſing, therefore, a purloining or embezzling, it is not ſtealing. The offence, if there be any, is of another kind a cheat.

1 *Hawk.* 135. *in not.* *Galbraith* and *Brackenridge* for the ſtate. There is an actual and conſtructive poſſeſſion, an abſolute and ſpecial property; and larceny may be of either.

PRESIDENT. There muſt be a *taking*, as well as a *carrying away*. Unleſs you can conclude, from the proof, that *Campbell* had abandoned the poſſeſſion of the note to *Proſſer*, who, from this abandonment, and his under-

taking to change the note, became liable to *Campbell*; or that *Proffer*, in conſequence of his agreement, with conſent to change, had taken the note; he had no poſſeſſion; therefore, there can be no taking, and, of courſe, no larceny. But, if the poſſeſſion was changed from *Campbell* to *Proffer*, a taking and carrying away by *Campbell* would be larceny, though *Proffer* had a ſhare in the note; for the change of poſſeſſion rendered *Proffer* anſwerable to *Campbell* for his half. If the poſſeſſion of the note was not changed, and if *Campbell* impoſed an empty paper, for one incloſing a note, though puniſhable as a miſdemeanor, this, is no felony. Therefore, if the proof amount only to this, there can be no conviction on this indictment; although you or I may think, that there is little natural difference in the degree of enormity of ſuch miſdemeanor and larceny. 1794.

The jury found him guilty.

WASHINGTON COUNTY,

June Term, 1794.

WILLIAM DAVIS, for the uſe of JAMES EVANS, *v.* DAVID CAMMEL.

AN action of debt was brought to *March* term, 1793, on a ſingle bill, for 13*l.* 3*s.* 11*d.* dated 4th *October*, 1792, payable, with lawful intereſt, on 27th *November* enſuing, and aſſigned 19th *December*, 1792. The defendant, at the trial, offered a depoſition of the aſſignor, to prove, that it was by miſtake, that the note was made payable in *November*, 1792, and that it was his and *Cammel's* intention, to make it payable in 1793.

Roſs, for the plaintiff objected to this, as invalidating the aſſignment made by himſelf, and no man ſhall be ſuffered to invalidate his own acts. The act of aſſembly for the aſſigning of bonds precludes the aſſignor from releaſing the debt; and depoſitions or acknowledgements ſubſequent to the aſſignment may, in effect, 1 *T. Rep.* 320. 1 *St. L.* 107.

1794. do the ſame thing, and defeat the proviſion of the act of aſſembly.

Bradford and *Purviance*, for the defendant. The original payee of the note could not have recovered, if ſuch evidence had been offered againſt him: and the act of aſſembly puts the aſſignee preciſely in his ſituation, ſo as to recover only as the aſſignor could.

PRESIDENT. There ſeems to be ſtrong reaſon, to conſider the aſſignment, as an engagement, by the aſſignor to the aſſignee, that ſo much money as appeared due, was due, on the note, at the day therein ſpecified: and the evidence offered goes to contradict this; and, beſides defeating the proviſion of the act of aſſembly, and enabling *Davis* and *Cammel* to cheat *Evans*, goes alſo to prove a thing contradictory to the note, and make it materially different from what it is. The miſtake is in the defendant, and ought not to affect a third perſon not concerned in it. Shall we rectify this miſtake of *Cammel*, at the expence of *Evans*? *Cammel*, when ſued, might have informed *Evans* of the miſtake, tendered the coſts accrued, and the debt, when, by his own acknowledgement, it was really due. He would then have come forward with ſome equity. But no evidence is offered, that *Evans* knew of the miſtake previous to the ſuit, or at any time ſince. Such evidence might be proper. The acknowledgement and depoſitions are ſubſequent to the aſſignment, which took from *Davis*, and gave to *Evans*, all intereſt in the note; it is therefore the acknowledgement of one having no intereſt; and cannot affect him who has the intereſt.—Were there no aſſignment, and the miſtake mutual, unleſs the party bringing the ſuit were conſcious of the miſtake, why ſhould *all*, or perhaps why ſhould *any* of the coſts fall on him? We will however reſerve the point.

See Cook v. Laughlin, poſt

By conſent a verdict was given for the plaintiff, ſubject to the opinion of the court on the depoſition offered, and another to be made with a view to eſtabliſh the miſtake and *Evans'* knowledge of it.

Judgment was given for the plaintiff for 13*l.* 3*s.* 11*d.* debt, with 9*s.* 2*d.* damages, and all coſts ſubſequent to 27th *November*, 1793, when, at all events, *Cammel* ought to have paid the debt.

GEORGE ROGERS CLARKE *v.* JOHN M'INTIRE.

AN action of debt, on a bond in the penalty of 500*l.* was brought to *April* term, 1792. An action had been brought, on the ſame bond, in *Ohio* county, and diſcontinued. The bond was for the delivery of flour, and was given as the conſideration of a purchaſe of a tract of land in *Ohio* county, claimed by virtue of an actual ſettlement and a military warrant. The purchaſe was made 17th *July*, 1786, the date of the bond. The defendant pleaded payment, with leave to give want of conſideration in evidence. On this plea, the defendant ſhewed an exemplification of a patent, dated 11th *October*, 1783, from the ſtate of *Virginia* to *Moſes Chapline* for 500 acres, ſurveyed 11th *December*, 1781, on a military warrant, dated 19th *March*, 1781. Evidence was alſo given, from the ſurveyor, of a ſurvey for *David Rogers*, on a certificate of an actual ſettlement, prior to that of *G. R. Clarke*, of 400 acres; and that theſe two ſurveys took up all the claim and ſurvey of *Clarke*, except a long narrow ſtrip of about 50 acres. *Moſes Chapline* is in poſſeſſion of his ſurvey, believes his title the beſt, and will maintain it. The heirs of *David Rogers* alſo continue their claim and poſſeſſion. *Clarke* had no military warrant entered; nor had he any certificate of ſettlement, till *November*, 1786, when on an application in his name by *M'Intire*, the court of *Ohio* county ordered a certificate to be granted of a ſettlement in 1773. 1794.

Brackenridge, argued for the defendant.—*Roſs* and *Bradford*, for the plaintiff.

PRESIDENT. It has been objected, by the counſel for the plaintiff, that we have no authority to try the title of land in *Virginia*. *Directly*, it is true, we have not. But when it comes *incidentally* before us, in a caſe over which we have juriſdiction, the *principal* draws after it all its *incidents*. It is indifferent where the land lies, be it in *Turkey* or in *China*, the right to it comes incidentally before us, in the trial of a perſonal action, for the trial of which its examination is neceſſary: therefore we have authority to examine it.

1794. But who brought the cauſe here? The plaintiff was, at the time of the contract, and of bringing the ſuit, a citizen of *Virginia*, and is now a citizen of *Kentucky*.— The defendant was then, and is yet a citizen of *Virginia*. The contract was made in *Virginia* reſpecting land in *Virginia*. The plaintiff arreſted him in *Pennſylvania*, and would uſe his own arts, to deprive the defendant of the advantage of his defence. Had the cauſe been tried in *Virginia*, the courts there could try the right; and this objection would not have exiſted. Had the cauſe been tried in *Virginia*, there is a court of Chancery there, to which the defendant could have applied for an injunction, to ſtay the plaintiff from execution, till he could try the title, and ſhew whether he had value or not for the bond. In *Pennſylvania*, there being no court of Chancery, or power of injunction, defendants are at liberty to give want of title or any other conſideration in evidence. The objection, that the land is in *Virginia*, comes with a very ill grace, on the part of a man who has himſelf brought the cauſe here, if he would deprive the defendant of the advantages, which he could have had where he and the plaintiff lived, and where the contract was made, and the ſubject of diſpute lies.

We endeavoured to reduce the matter to the ſame ſhape, as if the cauſe had been tried in *Virginia* under the power of an injunction. We propoſed a judgment for the plaintiff, with a ſtay of execution till the title could be tried in *Virginia*. But the plaintiff's counſel rejected this propoſal.

It will be attended to, that, at the time of the contract, there was a patent, for *Moſes Chapline*, for part of the land ſurveyed by *M'Intire* on this claim. If we were excluded from examining *Virginia* titles; is not this concluſive evidence, that *Chapline* has the title? This patent, being previous to *Clarke's* certificate on his ſettlement, excludes the certificate; for the authority of granting certificates was for unpatented land.

Act of Virginia, 1779.

It will alſo be attended to, that *Clarke*, at the time of the contract, repreſented that he had a military warrant located on the ſpot. There is evidence from the ſurveyor of the diſtrict, that no ſuch warrant was or is located. The queſtion then is, Did *M'Intire* take his chance of the land, knowing all the circumſtances? Or

did *Clarke* ſell, and *M'Intire* buy a title repreſented or ſuppoſed good for a competent price? The preſumption is ſtrong, that it was intended on both ſides, to buy and ſell a good title. Whether the fact be ſo or not, you will judge from all the circumſtances. 1794.

If a ſuppoſed good title was bought, the next queſtion is, For how much land; and whether *M'Intire* has got all that was intended as the worth of his money? The value of whatever part he has not got of what he ought to have got, you will, under this plea, conſider as paid of the bond.

As to *David Rogers'* title, the defendant has not made a clear caſe. He ought to have ſhewn a good title againſt himſelf. He has only ſhewn preſumption, the weight of which, conſidering the propoſition which has been made to the plaintiff and rejected, you will judge. If any of the land ſold be within *Moſes Chapline's* ſurvey, you ought to deduct in proportion.

The jury found a verdict for the plaintiff for 25*l.* 5*s.* 1*d.* and coſts of ſuit; with this further, that the defendant ſhould proſecute for the recovery of the whole land, and, if recovered, pay the contents of the bond.

This was compelling the plaintiff to accept the propoſition, which had been made. The 25*l.* 5*s.* 1*d.* found for him, was for the 50 or 58 acres not included in either of the ſurveys of *Chapline* or *Rogers*.

Roſs, two days after, on the part of the plaintiff, moved for a new trial, on a caſe ſtating the circumſtances, and read 3 *Comm.* 390, and the caſe of *Steinmetz v. Curry*, *Dall.* 234, and argued on the following points.

1. The court left it open to the jury to preſume title to deſtroy the title ſold, when the action was on a deed, and it became incumbent on the defendant to ſhew want of conſideration. The *onus probandi* was on him, and he muſt ſhew it abſolutely, eſpecially as he had a patent on the title ſold and the certificate afterwards obtained from the court of *Ohio* county. The jury ought to have preſumed no title, to wit, no certificate, becauſe none was ſhewn; and the court ought to have ſo directed them, agreeably to the deciſion of the court of *Weſtmoreland* county in the caſe of *Carnahan v. Hall.* *Ante p.* 127

PRESIDENT. That caſe was decided on an exception to evidence. Here the evidence was admitted without exception.

1794. *Roſs.* If the court, on exception, would have excluded the teſtimony, they ought poſitively to have directed the excluſion of its effect.

2. From the poſſible ignorance of foreign titles, there may be great inconvenience in this court judging of any foreign title.

3. We were ſurpriſed by haſtily ſuffering the evidence to go to the jury, mixed with proper teſtimony.

Brackenridge, for the defendant.

1. The court did direct the jury, that it was not the beſt evidence; and left the preſumption of the exiſtence, and the preſumption of the want, of the beſt evidence of title to operate againſt each other; that the jury might weigh both, and decide accordingly.

2. The *lex loci* is the ground on which every contract muſt be determined; yet a contract may be ſued on any where. So, whatever be the conſideration of a bond, *value* of that conſideration may be examined by the court in which a recovery on it is demanded.

3. If any ſurpriſe had been, juſtice has been done.—There certainly does exiſt a good title, a patent, in the aſſignee of *David Rogers*. But through ignorance of the name, which we now know, we could not obtain it before the trial, and I did not think of the certificate and entry.

The court took time to conſider it: and the caſe has never ſince been mentioned.

ALLEGHENY COUNTY,

September Term, 1794.

NATHANIEL IRISH, Inſpector of flour, *qui tam*, &c. *v.* ROBERT ELLIOT and ELIE WILLIAMS.

THE inſpector declared, that *Elliot* and *Williams* offered to him, for his inſpection and examination, 88 barrels or caſks of flour, then intended for exportation by them; which ſaid caſks, under an act of aſſembly of 5th *April*, 1781, entitled, an act to prevent the exportation of bread and flour not merchantable, &c. were

1 *St. L.* 883.

of the deſcription number 2, and ought to have contained each 196 *lbs.* when, in fact, they did not contain 196 *lbs.* but were deficient 1469 *lbs.* whereby action accrued to him, to have 55*l.* 1*s.* 9*d.* that is to ſay, 9*d.* per *lb.* deficient. 1794.

Conſidering this as a mere queſtion of law, the counſel on both ſides agreed to ſubmit it to the opinion of the court.

Woods, for the plaintiff. The act for preventing the exportation of bread and flour not merchantable makes the caſk and flour forfeitable for deficiency of weight, and preſcribes the method of recovering the forfeiture. The ſupplement to this act ſubſtitutes the forfeiture of 9*d.* per *lb.* deficient, inſtead of the whole flour and caſk. This is favourable to the exporter. The act to regulate the inſpection of flour in theſe weſtern counties refers to the firſt law, and, of courſe, to all the ſupplements. Therefore the inſpector has now no authority to ſeize the caſk and flour, but only exact 9*d.* per *lb.* deficient. Divers ſtatutes, relating to the ſame thing, are all taken into conſideration, in conſidering any one of them. The act of 39 *El. c.* 3, though expired, yet having been undoubtedly under the view of the legiſlature, when the act of 43 *El. c.* 2 was made, was taken into conſideration in the conſtruction of this laſt act.—So 13 *El. c.* 10, being enlarged by 14 *El. c.* 11, though only the former be recited by 18 *El. c.* 11, it has been holden that the latter is virtually recited therein. The intention of the makers of a ſtatute ought to be taken into view, rather than its letter. The legiſlature could not mean to make the flour and caſk forfeitable here. And it is impoſſible to lay aſide the clauſe impoſing that forfeiture, without ſubſtituting the clauſe in the ſupplement directing the forfeiture of 9*d. per lb.* The inſpectors and millers are ſubject to like duties, penalties, &c. as in caſe of the port of *Philadelphia*. 1 *St. L.* 885, 889. 2 *St. L.* 2. 3 *St. L.* 156. 4 *Bac.* 646. *ib.* 647. 3 *St. L.* 156.

Brackenridge, for the defendant. The act of *September*, 1791, refers to a particular act paſſed on a certain day, the 5th *April*, 1781. A ſupplement conſtitutes, of itſelf, an act diſtinct from the original act, as much as an act to amend an act does. Extending an act does not extend a ſupplement. The act of 28th *December*, 1781, recogniſes a diſtinction between an act and a ſupplement.— 3 *St. L.* 156. 2 *St. L.* 2, 3.

1794. From an overſight, we cannot infer an intention to ſupply it. And courts cannot ſupply the want of reflection, in the legiſlature. The intention of the legiſlature, is not what they intended to do, but did not; but what they have really done, diſcovering this by their expreſſions. We ſay, no penalty is impoſed by the law. The legiſlature has omitted it. The act does not refer to all the acts on the ſubject, but to an individual act, intitled an act, &c. What the legiſlature thought they had done, but did not, is no law. A ſupplement, or a new law, muſt be made. Penal acts are ſtrictly bounded. This is for a penalty, and the conſtruction contended for is, at leaſt, doubtful.

The court took time to conſider. And, at the next term, Mr. *Brackenridge*, ſuggeſting, that the allegations in the declaration were more unfavourable to the defendants, than the facts of the caſe were, deſired to withdraw the ſubmiſſion, that he might plead to iſſue to be tried by a jury. This was done; and the cauſe, after ſome time, was ſettled by a reference.

It may not however be improper to add here the opinion which I had drawn up, to be delivered on the ſubmiſſion. It is as follows:—

The inſpector declared, &c.

On this ſtatement, It has been ſubmitted to us to determine, whether 9*d. per lb.* of deficient weight be recoverable.

3 *St. L.* 156. The counſel for the plaintiff contended, that the weſtern inſpection law enacting, for the inſpection of the weſtern counties, the regulations contained in the act

1 *St. L.* 883. intitled "An act to prevent the exportation of bread and flour not merchantable, and for repealing, at a certain time, all the laws heretofore made for that purpoſe," does, of courſe, enact all the regulations contained in

2 *St. L.* 2. the ſupplement to that act: for all ſtatutes, relating to

4 *Bac.* 646. the ſame ſubject, are to be conſidered as one law. The forfeiture of 9*d. per lb.* deficient, impoſed by the ſupplement, cannot be laid aſide, without adopting the ſeverer forfeiture of the whole caſk, impoſed by the original law; and the intention of the legiſlature is to be regarded rather than ſtrict expreſſions.

The counſel for the defendant contended, that, this being a penal law, its conſtruction will not be extended

by implication; for a penalty will not be exacted on a doubtful conſtruction of a law. The intention of the legiſlature, that will be regarded by the judiciary, is not what they intended to do, and did not; but what they intended in what they really did, collecting their intention from their expreſſions. From an overſight in the legiſlature, courts cannot infer an intention to ſupply the overſight, and proceed themſelves to do what the legiſlature would have done, if they had obſerved the omiſſion. It would be ſtrange, if what the legiſlature thought they had done, but did not, were a law; or if courts ſhould take upon them to ſupply the want of reflection of the legiſlature, and judge or pronounce the law, not from the expreſſions, but from the thoughts of the legiſlators. This is a *caſus omiſſus*, and can be remedied only by a new law. For ſuch a deficiency, there is a penalty impoſed by the eaſtern inſpection law, but none by the weſtern. A ſupplement is, in all reſpects, a diſtinct act from the original. Our inſpection law refers to a certain act, which appears to have been paſſed on a certain day, to wit, 5th *April*, 1781; and extending this act to us does not extend the ſupplement alſo. 1794.

Such is the ſubſtance of the arguments on both ſides.

It cannot be denied, that the rule, "that divers ſtatutes relating to the ſame thing ought all to be taken into conſideration, in conſtruing any one of them," is a ſound rule of conſtruction; in like manner as that all the parts of one ſtatute are to be taken into conſideration, in the conſtruction of any one part. So, alſo, of all the parts of a deed; and ſo of all deeds relating to one tranſaction. The whole is conſidered as one whole, one ſyſtem, one law, one deed. But this is a rule of conſtruction only, and makes them one, only for the purpoſe of conſtruction or mutual explanation. It does not mean, that referring to *one* act neceſſarily refers to *all* acts on the ſame ſubject; or that extending *one* act to a diſtrict, where it did not operate before, extends all *other* acts on the ſame ſubject to this diſtrict.

Among other notes read by the plaintiff's counſel, from *Bacon's Abridgement*, the following ſeems moſt, or is rather the only one that ſeems, to ſupport his opinion. "The 13 *El. c.* 10, concerning leaſes made by ſpiritual 4 *Bac.* 646.

1794. persons, being enlarged by the 14 *El. c.* 11, although only the former of these statutes be recited in the 18 *El. c.* 11; it has been holden, that the latter is virtually recited therein."

It is dangerous to found opinions on abridgments however respectable. On turning to the case of *Bayley v. Murin*, referred to in this note, the doctrine stated in the abridgment appears to be one of the reasons for a doubt or opinion of only one of the judges, a most respectable one indeed, chief justice *Hale*, but this opinion was contradicted by the rest of the court. On examining the two statutes of 13 *El. c.* 10, and 14 *El. c.* 11, it appears, that the 14 *El.* is, as in the case cited it is called, but a kind of appendix to the 13 *El.* a construction or explanation of its extent: and was made on purpose to define, extend, or limit the sense of it and other statutes, and is intitled "An act for the continuation, explanation, perfecting, and enlarging of divers statutes." The supplement, in the case before us, is an *alteration* of the original law. And to say, that the law of *September*, 1791, by referring to the law of *April*, 1781, referred also to the law of *December*, 1781, is saying, that it enacts different regulations, from those to which it refers. 1 *Ventr.* 246.

No authority therefore has been shewn, to justify an opinion, that extending one statute, of course, extends all its supplements, or all statutes on the same subject. A supplement seems to be a separate law; and to extend or repeal it, it must be specially named. This very supplement, which, it is contended, must be considered as extended with the original act, contains in itself a declaration, that it is a distinct law from the original act; for it provides, that "all fines and penalties, herein mentioned, shall be recovered, and applied, in manner and form, as directed by *this act*, and *the act to which this act is a supplement.*" And another supplement to this original act, extending the regulations, fines, penalties, and forfeitures of the original act and its supplements, to the cases provided for in this last supplement, provides, that "all and every the regulations, fines, penalties and forfeitures, in *the said recited act*, and *the several supplements* thereto, and by *this act*, made, imposed, and inflicted on any persons who should, &c. or should or shall offend against 2 *St. L.* 3. 2 *St. L.* 714-5.

the ſaid *recited act*, or *the ſupplement thereto*, or againſt *this act*, ſhall, &c. as if the article was inſerted in the ſaid *acts*, or as if the ſaid regulations, fines, penalties, and forfeitures, were herein repeated. 1794.

If the legiſlature enacting the law of 1791, and referring to the law of *April*, 1781, referred to the law of *December*, 1781, they muſt have referred alſo to the law of 1789—and, in both theſe laws, they muſt have obſerved the mode of expreſſion uſed in the laws, when both an act and its ſupplement are referred to. And if they turned over the volumes of the acts of aſſembly, and examined the expreſſions conſtantly uſed in all ſuch references, they would have uniformly found in all the ſame recital of act and ſupplement or amendment; and no where, in my obſervation, would they have diſcovered, that the legiſlature, intending to extend, confirm, or repeal, an original act and ſupplement or amendment, ever confined its expreſſion to the original law only, but always repeated the titles of all the acts to be extended, confirmed, or repealed.* 3 *St. L.* 156. 1 *St. L.* 383, 2 *St. L.* 2. —713.

If then the legiſlature which enacted the weſtern inſpection law, in referring to the law of *April*, 1781, did not uſe ſimilar expreſſions to thoſe uſed by all other legiſlatures, in referring alſo to any ſupplement, what are we to conclude from this, but that they did not mean to refer to any ſupplement? Againſt this uniformity of ſtile in all other laws, I ſee no circumſtances ſufficiently ſtrong, from which, in the caſe of a penalty, to infer an intention of the legiſlature to extend to the weſtern inſpection, the ſupplements to the law referred to. For us to ſay, that they intended it, becauſe we may think they ought to have done it, is to make ourſelves legiſlators. And to ſuffer executive officers, to model or apply to the exerciſe of their authority, ſuch laws, or parts of laws, as they may think commodious, is too dangerous to be admitted, and is, in fact, making them legiſlators. If, therefore, the ſupplement be not ex-

* St. L. 121-3, 131-8, 307-9, 311-2, 323-7, 333, 343, 358-73, 374, 444-9, 504-9, *Galloway's ed.*—2 St. L. 152, 162-7, 192-4, 221-4, 245-50, 282-7, 347-71, 373-4, 414-8, 493-9, 505-7. *M'Kean's ed.*

1794. tended to the weſtern inſpection, the plaintiff's demand fails. It is better to ſay, that this caſe is not provided for, by our inſpection law, than to leave inſpectors at liberty to pick and chooſe, out of all the ſupplements, ſuch parts, as, from their circumſtances, *they may ſuppoſe* the legiſlature intended to apply to us. The law was not made for the benefit of the inſpectors. And, if thoſe concerned in the flour trade think the law imperfect, let them apply to the legiſlature for a new law, and a more complete ſyſtem.

In fact our inſpection law ſeems to have been drawn
3 *St. L.* 157. up with very little care. Though in the reference to the original law, the ſections providing for covering waggons, ſhallops, &c. are excepted yet the ſection inflicting penalties, for the defect of this, is not excepted: and, though the duty is diſpenſed with, the penalty may be exacted for the neglect of it, with more colour of authority, than for the deficiency which is the ground of this action. Of laws ſo careleſsly penned as little as poſſible of the meaning ought to be drawn from preſumption.

Laws impoſing a penalty are ſometimes conſidered as remedial laws. They have been conſidered as remedial, when the penalty goes to the party grieved. The penalties of theſe laws are not ſo applied; and it is the inſpector who ſues here, not the purchaſer or perſon concerned in the injury, if any injury exiſted. We know not that there was any fraud, and we cannot intend, that there was. Perhaps the flour was taken and to be delivered by weight, not by the barrel. Perhaps the flour was not to be exported *for ſale*. *Elliot* and *Williams* were and are contractors for the army: it might have been for the uſe of the army, and, on the delivery there, its quality and quantity would be examined. Our in-
3 *St. L.* 156. ſpection law impoſes a penalty on any perſon exporting flour out of the ſtate, from theſe counties, by means of the river *Ohio*, before the ſame be inſpected. Suppoſe an emigrant to *Kentucky* ſhould take in his boat a quantity of flour from theſe counties, for the uſe of his family for the year enſuing; and not calling on the inſpector to examine it, ſhould be ſued for the penalty; would the law be conſidered as remedial or penal?

Comm. 88. I take the caſe before us to be a penal action, on a

penal law, to be ſtrictly conſtrued. And, in this view, I muſt declare, that a penalty ought never to be exacted from any man omitting to do what he cannot *clearly* diſcern to be his duty to do. Were it therefore only *doubtful*, whether this regulation extended to the weſtern inſpection, I ſhould think this doubt alone a ſtrong, a concluſive argument againſt the plaintiff. 1794.

The weſtern inſpection law directs the ſame regulations, "*except as to the ſtamp on the plugs, which ſhall be marked with the letters W. P.* as are preſcribed by the act of *April*, 1781." Now were not the weſtern inſpection law careleſsly penned, and were it not, in many inſtances at leaſt, to be conſidered as a penal law; ſome preſumption might be drawn from this expreſſion, that it was intended to refer alſo to the ſupplement of *December*, 1781. For this expreſſion ſeems rather to refer to the 5th ſection of the ſupplement, than to the correſponding 11th ſection of the original law. 3 *St. L.* 156. 1 *St. L.* 833. 2 *St. L.* 3. 1 *St. L.* 886.

On this ground alſo of this being a caſe on a penal law, I cannot conſent to apply to it the authority of a deciſion, in the caſe of *Williams v. Roughsedge*, which has not been cited. For, though that deciſion ſhows, that an act, reviving a principal act, may be held to revive, without naming it, an act explanatory of the principal act; yet it was the caſe of an inſolvent debtor in priſon; and an equitable conſtruction was given to the reviving act, in favour of the priſoner's liberty. Here we are called on to ſtrain the conſtruction, to aid the recovery of a penalty. 2 *Burr.* 747.

On the whole, therefore, my opinion is for the defendant: and let the legiſlature provide for the omiſſion, by a new and complete ſyſtem.

WASHINGTON COUNTY.

September Term, 1794.

PENNSYLVANIA *v.* JAMES FARREL.

1794. ON the trial of an indictment for forging and knowingly publishing a note, the person whose note it purported to be was called as a witness.

H. Ross, objected to his admission. Under the statute of 5 *El.* the person injured could not be a witness. Our act of assembly pursues the stat. 5 *El.*

Rex v. Rhodes 2 *Str.* 728. 2 *Hawk.* 611.

PRESIDENT. You may either argue or reserve the point.

They agreed that it should be reserved; and the forgery and publication were proved.

Brackenridge for defendant. Unless the court has doubts on the point of competency, seeing the witness has so plain an interest to invalidate his own obligation, I hope the court will instruct the jury to disregard the testimony.

PRESIDENT. I will not do so. The cases on this subject are not very consistent; but I acquiesce in the cases of *Abrams v. Bunn*, and of *Pennsylvania v. Keating*, and hold the witness competent. His credibility lies with the jury.

4 *Burr.* 2251. *Dall.* 110.

Verdict guilty.

ALLEGHENY COUNTY,

December Term, 1794.

PENNSYLVANIA *v.* ANDREW ROBERTSON.

ROBERTSON was indicted for the murder "of an *Indian* man of the *Munsey* tribe," on 1st of *May*, 1794.—

Robertson was in the employment of the contractor and in a house of his, at *Fort-Franklin*, and was frying

meat on the fire. The *Indian* came in drunk, and ſtept acroſs the frying-pan, as if to kick it over. *Robertſon* bade him go out, and on his refuſing, ſaid he would put him out. The *Indian* perſiſting in his refuſal to go out, *Robertſon* proceeded to put him out. A ſtruggle enſued, and both fell. *Robertſon* got up firſt, and ſeized the *Indian's* feet, to drag him out. When he had dragged him as far as the door, the *Indian* ſeized the door poſt. *Robertſon* called to ſome preſent, to part the *Indian* from the door-poſt. The *Indian* ſaid he would let go his hold. *Robertſon*, then let go his hold of the *Indian's* feet. On this the *Indian* kicked *Robertſon* with one of his feet in the face, ſo that the blood run from his noſe in a ſtream. Then the *Indian* got up, and made at *Robertſon*, who thereupon ſeized the bar of the door, which was of cherry-tree, three feet long, about three inches broad, and half an inch thick, and ſtruck the *Indian* with the narrow ſide of it, on the ſide of his head, ſo that he inſtantly fell and died. The *Indian* was a ſtrong man, of about ſix feet high, much ſtouter than *Robertſon*. He was ſtanding outſide the door, and between *Robertſon* and the door. The bar was lying outſide the door on the ground. The *Indian* had a knife. The *Indians* generally were, at that time, ſuppoſed to be dangerous, ſo that the people durſt not go out of the fort. The *Munſey* tribe, or part of them, were hoſtile, this man was under ſtrong ſuſpicions, was a *bad Indian*, of no repute among his own people, who thought the killing of him not improper. Such was the caſe on the evidence. 1794.

Brackenridge and *Collins*, for the priſoner, contended, that this was but homicide *ſe defendendo*, and the jury ought to acquit. 1 *Hawk.* 113, 3 *Bac.* 675, 1 *Hale*, 486, 4 *Comm.* 184.

Galbraith, for the ſtate, cited 1 *Hale*, 485, 1 *Hawk.* 105, 108.

PRESIDENT. The circumſtances proved clear this caſe of all preſumption of malice. The killing therefore is not murder.

Is it manſlaughter? It was lawful for *Robertſon* to exert as much force, as was ſufficient to put the *Indian* out of the houſe. It does not appear that he uſed more,

1794. After he had accompliſhed this, the *Indian* was the aggreſſor, by kicking *Robertſon* with his foot. He was proſecuting his attack, "he made at *Robertſon.*" He was a *ſavage*, a *drunk* ſavage, a ſavage naturally *illdiſpoſed, armed* with a knife, a *ſtronger* man than *Robertſon*; and his *nation* and *himſelf* were under ſtrong ſuſpicions of hoſtility. All theſe circumſtances were ſufficient to alarm *Robertſon* for his own ſafety, and induce him to arm himſelf with a ſtick, to prevent the danger of the *Indian's* attack, and ſave his own life, by a ſtroke at the life of the *Indian.*

If you believe, that *Robertſon* might have otherwiſe entered the houſe, or eſcaped, and that the blow was given in a mutual combat, without neceſſity either from the protection of his life, the poſſeſſion of his houſe, or his right of entering it, the killing is manſlaughter.

If you believe, that there was no other probable way to get into the houſe, or otherwiſe eſcape from the rage of the *Indian*, and the danger of his life, than by the blow given, it is but homicide in ſelf-defence.

Foſter 279-91. If you believe it homicide in ſelf-defence, you may acquit the priſoner on this indictment.

Verdict not guilty.

Leſſee of WILLIAM WADDEL *v.* THOMAS GRAY.

THIS was an ejectment for 302 acres and 18 perches of land in *Plumb* townſhip, *Allegheny* county, on the demiſe of *Robert Waddel*, of 2d *July*, 1791, to hold from 1ſt *July*, 1791, for ten years.

The plaintiff ſhewed a warrant dated 30th *Auguſt*, 1785, for 300 acres of land, on the waters of *Thompſon's* run, joining lands of *Bernard Dougherty* and others, intereſt commencing from 4th *March*, 1772; with a ſurvey, made 7th *July*, 1787, on this warrant and an order of the Board of Property of 5th *March*, 1787, containing 302 acres and 18 perches; and a patent, on this warrant and ſurvey, dated 24th *March*, 1792.

He then proved, that *Joſeph Creſwell*, having a general authority from *David Rogers* to make or buy improvements for him, bought, for a trifle, from *James*

Myers, a ſmall improvement, to wit, ſome trees deadened, got a ſurvey made on it including this improvement and the land in diſpute, hired a man to make rails, had about nine hundred made, ſome more trees deadened, and a cabbin raiſed to the joiſts. This was between the years 1772 and 1774. None ever lived on the land, till *Iſaac West* came on it, claiming for himſelf. This was before, or in, the year 1774. He roofed the cabbin, and lived in it; built a houſe twenty-ſeven feet long, made a large improvement of upwards of twenty acres of cleared land, and lived on the land till 1778, when he was killed by the *Indians*, the houſe burnt, and the neighbourhood deſolated. 1794.

The defendant ſhewed a location, No. 3396, in the name of *Eleazer Myers*, dated 13th *June*, 1769, for 300 acres of land, joining lands of *Jacob Bouſman*, about a mile and a half from *Forbes's* breaſt-works, on the waters of *Thompſon's* run, on the right hand branch about four miles and a half from the mouth; with a ſurvey made on this location, 3d *December*, 1784, containing 352½ acres and allowance, on a branch of *Thompſon's* run in *Pitt* townſhip, *Weſtmoreland* county. Before this ſurvey, *E. Myers* had, on this location perhaps, though that did not certainly appear, made a ſurvey of another tract of land, about half a mile or three quarters of a mile diſtant from this, and ſold it to *Bernard Dougherty*; but one *Beattie* having a prior location for that, *E. Myers* gave up his pretenſions, that *Beattie* might obtain his patent, and afterwards, on 3d *December*, 1784, made the above ſurvey of the land in queſtion, which anſwered exactly, and better than *Beattie's* land, to the deſcription of this location.

The defendant alſo proved, that, in the fall of 1772, *Robert Thompſon* made an improvement on the land in queſtion, on *Thompſon's* run, deadened trees, made bruſh heaps, marked a tree with his name, and afterwards, and perhaps before *West* was killed, ſold this improvement to *E. Myers* for 15*l.* *Creſwell's* improvement was about a quarter of a mile diſtant, and both his and *Thompſon's* were within both ſurveys made on *Waddel's* warrant and *Myers's* location. In ſpring, 1785, *E. Myers* put a tenant on the land, who fitted up an old uncovered cabbin, and went into it, under a leaſe for four years.

1794. The old improvement was then all grown up. None had lived on it from the time of *West's* death. This tenant cleared and planted nine acres that ſpring, twelve acres the ſpring following, and nine the ſpring after that. *E. Myers* occaſionally, from time to time, claimed title, through his location, to the land in *West's* poſſeſſion. *Iſaac Lane*, who came to this country with *West* in 1772, made an improvement a quarter of a mile diſtant from *West's*, and, together with *West's*, within the ſurvey afterwards made by *Creſwell*. In the fall of 1772, or ſpring of 1773, *Rogers* and *Waddle* came to *Lane*, and he bought *Rogers's* claim for 10*l*. *E. Myers* was preſent, and ſaid he would have that or the adjoining tract by his location, but would let *West* live there all his days.

PRESIDENT recapitulated the title and teſtimony on both ſides, and made three queſtions.

1. Had *E. Myers* a right to lay his location on any vacant land, ſuppoſing he had, before, laid it on *Beattie's* land, which is not the land in diſpute?

2. On 3d *December*, 1784, was there any thing to hinder *E. Myers*, from laying his location on the land in diſpute?

3. Will the plaintiff's patent, as ſignifying the will of the proprietor, conclude you from examining the adverſe titles, as they ſtood on 3d *December*, 1784?

1. The location applies exactly to this land, and would not apply ſo well to any other. *E. Myers* therefore miſtook in his firſt ſurvey, and got nothing by it; for an elder title intervened. Was he therefore bound by this miſtaken election, or might he correct his miſtake, and come upon the land which really anſwers the deſcription in his location? I think he was not bound by his firſt election, and he might make a new ſurvey on land anſwering the deſcription in his location, unleſs, in the mean time, an adverſe title, either poſitive or equitable, had, under the confidence of his firſt election, attached itſelf to the land deſcribed in the location, afterwards reſorted to, and now diſputed.

But it is objected, that *Eleazer Myers* had ſold to *Dougherty*, and could not then change the application of the location. I anſwer, this lies not in the mouth of *Waddel*.

2. On 3d *December*, 1784, *Waddel* had no positive strict legal title. Had he then such an equitable title, as was sufficient to exclude the location from this land? I think not. His only title was a cabbin unfinished, and rails cut; a mere *improvement* (as to distinguish it from a settlement I will call it) made on a general *land-jobbing* scheme, and never pursued by the maker up to a real settlement. The title of *Francis Waddel* (if it were vested in *Robert*) was but precisely what the title of *Rogers* was. The only actual settlement was made by *West*. But why should *Waddel* derive any benefit from the labour of *West*, rather than the tenant in possession? Surely the tenant in possession has of the two the best right to claim under this labour of *West's*. 1794.

3. The proprietor or Commonwealth, or any other owner of property may give it to whom they please, provided they have not tied up their hands, by a prior engagement, either positive or equitable. But if they have, courts of justice will not suffer them to break through their prior engagement, but will hold them to it. On 3d *December*, 1784, they were bound to *E. Myers*. Therefore the case is to be considered as of that date: and if *E. Myers* had a good title then, he has it yet. He had a good title then.

The jury being at the bar, ready to give a verdict, the plaintiff suffered a nonsuit.

Lessee of DAVID GILLILAND *v.* DAVID HANNA.

THIS was an ejectment for 300 acres of land on a demise dated 20th *January*, 1793, for five years.

The plaintiff produced a warrant for 150 acres of land on the waters of *Turtle* creek, in *Pitt* township, *Westmoreland* county, joining *John Roadarmer* and others, dated 2d *May*, 1785, in name of *Adam Gilliland*; and a survey on it of 133 acres and 149 perches, made 18th *September*, 1786.

He then offered *Adam Gilliland* as a witness to prove that the warrant was taken out in his name, as a mere trustee, and that *David Gilliland* was the real owner.

1794.

This was objected to without a conveyance.

Brackenridge, for the plaintiff. By the regulations of the Land-Office, a man could take out but one warrant in his own name. This is a truſt. The title is really in the *ceſtui que truſt*. Why ſhould he not ſupport an ejectment? The caſe of a truſt is out of the ſtatute of frauds.

2 *Ventr.* 361. 1 *Vern.* 367. *Dall.* 72, 424.

Woods, for the defendant. It is the plaintiff's own fault, that he had not a title, when he commenced this ejectment. The ſtatute of frauds precludes any parole evidence of title.

PRESIDENT. It will be beſt to receive the teſtimony, but reſerve the point for argument, if there ſhould be a verdict for the plaintiff; and if afterwards, on argument, the teſtimony ſhould be thought inadmiſſible, judgment of nonſuit will be entered.

Adam Gilliland then proved, that *he* did not take out the warrant or pay any money on it; and that, in 1785, he heard *David Gilliland* ſay, he would take out a warrant in his own name. Another witneſs proved that *David Gilliland* paid for the warrant.

The defendant produced a location, or order of ſurvey, No. 1486, dated 3d *April*, 1769, in name of *George Thomſon* for 300 acres adjoining *John Fraizer* and *William Powel*, on both ſides of *Turtle* creek, about three quarters of a mile from the mouth; and a ſurvey made by *William Thomſon* (the father of *George*, and then the ſurveyor of the diſtrict) 17th *April*, 1769, of 252¾ acres, near *Turtle* creek, *Weſtmoreland* county; and a warrant of acceptance, 2d *January*, 1788, of this ſurvey made on No. 1486, dated 3d *April*, 1769; and a patent, dated 2d *January*, 1788, on this ſurvey, and location No. 1486.

The plaintiff then produced,

1. A releaſe or aſſignment by *George Thomſon* to *John Perry* in fee-ſimple, dated 23d *April*, 1784, reciting,— "Whereas, on 3d *April*, 1769, *William Thomſon* procured an order in my name, for 300 acres of land, ſituate on both ſides of *Turtle* creek, joining *John Frazier* and *William Powel*, which ſaid *William Thomſon* conveyed to *Conrod Winemiller*, and whereas ſaid *Conrod* conveyed to *John Perry* and *Daniel M'Clintock*, and *Daniel M'Clintock* conveyed his half to *John Perry*;

now I do assign and release all my right and title to same land to *John Perry* his heirs and assigns." 1794.

2. A conveyance by *William Thomson* to *Conrod Winemiller*, dated 3d *May*, 1771, for the consideration of 25*l.* "of all his right to a certain tract of land situate on both sides of *Turtle* creek, and joining lands of *John Frazier* and *William Powel*, containing 300 acres more or less, being the same granted to me by an order of survey, dated 3d *April*, 1769, No. to have and to hold, &c. subject to purchase money, &c."

3. An order of the Board of Property, dated 6th *January*, 1794, "*John Perry* stated to the Board, that two surveys being made of two different tracts of land, on an application of *George Thomson*, No. 1486, dated 3d *April*, 1769, the right to one of which is vested in him, and that *George Thomson* has obtained a patent for the other tract. And on examining the surveys and transfers, it is thought proper to allow *Perry*, or those representing him, a patent, on payment of the purchase money and fees of office, according to the terms on which said application was entered.

Evidence was then given of an improvement on the land in question, in 1771, made by one *John Hucheson*, who cleared ten acres, had a house and garden, raised grain on it, and lived on it three or four years, after which he lost his senses, and his wife sold the land to *William M'Fatrick*, who lived on it a considerable time, till killed by the *Indians*, leaving a daughter yet alive. His executor put a tenant on it, in 1786, who lived on it two years. Then *Thomson* brought an ejectment against him, and, the executor having no money to maintain the law-suit, the tenant gave up to *Thomson*, and became his tenant.

Woods, for defendant. There are not two surveys on the location No. 1486, but only one made on the land in dispute, on which, as was determined yesterday, *Thomson* had a right to lay his location, waving the land originally intended. And from this survey, made 17th *April*, 1769, *George Thomson* derives a good title. If he did not, an equitable title is in the heir of *M'Fatrick*, and the defendant may keep possession, till this heir claims it. *Lessee of Waddle v. Gray.* *Ante p.* 248.

Brackenridge, for the plaintiff. The transfer, made by

1794. *William Thomſon* to *Conrod Winemiller*, of the land deſcribed in the location, and referring to it, being notorious in the country was a notice to all men, that the land now in diſpute was clear of this location, and might be taken by any other title. Therefore this location being otherwiſe ſatisfied, by the land deſcribed in it, and now held by the aſſignee of *William Thomſon*, the real owner of the location, *George Thomſon*, his ſon can from this location derive no title to the land in diſpute; for an attempt like this, to cover two ſeparate ſurveys under one location, will not be countenanced.

To ſuffer *George Thomſon* to ſhelter himſelf under the equitable title of *M'Fatrick*, is carrying the title ariſing from ſettlement farther than it ever has been carried. The reaſon why ſettlements are regarded is that it would be iniquitous to take from a man the fruits of his labour. But that is no reaſon why the land ſhould not be taken from another man, who never expended any labour on it.

PRESIDENT. It does ſeem, from the papers produced, and eſpecially from the order of the Board of Property, who had all the means of information, that two ſurveys have been made by *William Thomſon*, on one location; that he ſold the land for which the location was taken out, for 25*l.*; and afterwards laid this location on the land in diſpute, for which he has ſince obtained a patent. It is not neceſſary, at preſent, to give any opinion on this.

Runnington 15 For it is a general principle, that, if there be, out of the plaintiff, a better title in any man, than the plaintiff's, the defendant ſhall keep poſſeſſion againſt the plaintiff, until the better title appear.

The claim ariſing from the ſettlement of a new country, by the permiſſion of the proprietor, is meritorious. 1 *Veſey* 454. Lord *Hardwicke*, in the caſe of *Penn v.* lord *Baltimore*, ſays, that, in caſes of two great territories held of the crown, long poſſeſſion and enjoyment, peopling and cultivating countries, is one of the beſt evidences of titles to lands, or diſtricts of lands, in *America*, that can be; for the great beneficial advantages ariſing to the crown, from ſettling, &c. is that the navigation and the commerce of this country is thereby improved.—Thoſe perſons, therefore, who make theſe ſettlements,

ought to be protected in the poſſeſſion, as far as law and equity can. 1794.

Courts of juſtice in *Pennſylvania* have recognized ſettlements, as equitable titles, or claims of preference.

On 2d *May*, 1785, this land was ſettled, and *Gilliland* could not take it as vacant land; nor does he derive any claim from the ſettlement on it. It is iniquitous to take the ſettlement of another. It was iniquitous in *Gilliland*, to attempt to take it away from the heir of *M'Fatrick*. The title of *Thomſon*, if any, exiſted previous to *M'Fatrick's* ſettlement. Therefore the iniquity, if any, in *Thomſon*, reſpecting *M'Fatrick*, is leſs than that of *Gilliland*: becauſe *Thomſon* only proſecutes a title which commenced before *M'Fatrick's* equity; while *Gilliland* proſecutes a title which commenced after the equity of *M'Fatrick*. Whatever *Thomſon's* title may be, *Gilliland's* is bad, and the defendant is not to be diſturbed by it.

FAYETTE COUNTY,

December Term, 1794.

PENNSYLVANIA *v.* JOHN M'FALL.

THIS was an indictment for the murder of *John Chadwick*, on 10th *November*, 1794. In the morning of this day, *M'Fall* was drunk, came to the houſe of *Chadwick*, who kept a tavern, and got ſome liquor there. One *Myers*, a conſtable, came there. *M'Fall* had expreſſed reſentment againſt *Myers*, for having taken him on a warrant, and had threatened to kill or cripple him, the firſt time he met him. When *M'Fall* ſaw *Myers* he jumped up, and ſaid he would have his life.—*Chadwick* reproved *M'Fall* for this. *M'Fall* rubbed his fiſts at *Chadwick*, and ſaid he was not ſo drunk but he knew what he was doing. *Myers* ſoon went away. *M'Fall* went out after him, and again ſaid he would have

1794. his life. *Myers* rode off. *M'Fall* returned to go into the houſe again. *Chadwick* bade him go home; for he had abuſed ſeveral people that day, and had got liquor enough. *M'Fall* ſhook hands with *Chadwick*, and went away. *Chadwick* ſhut the door. About two minutes after, he returned. *Chadwick* roſe to keep the door ſhut. *M'Fall* jerked it off the hinges; dragged *Chadwick* out; and ſtruck him ſeveral times with a club on the head.—His ſcull was fractured by the blows; and he died the ſecond day after.

H. Roſs, for the defendant. Murder in the firſt degree muſt be premeditated. *M'Fall* was drunk, and thereby incapacitated to form any previous purpoſe of malice. He is only guilty of murder in the ſecond degree, a killing in paſſion, not of malice. I ſubmit it to the jury on the facts whether it be more than manſlaughter.

Galbraith, for the ſtate, argued, that it was murder in the firſt degree.

PRESIDENT. The malice neceſſary to make an unlawful killing murder, may be either expreſs, as plain marks of a deliberate deſign; or implied, from the aggravated nature and cruelty of the killing.

3 *St. L.* 599. It ſeems to be the intent of our act of aſſembly to uſe the diſtinction between expreſs and implied malice, for the purpoſe of diſcriminating between the murder which ſhall be puniſhed by death, and the murder which ſhall be puniſhed by confinement to hard labour. Murder committed with malice expreſs, as by poiſon, lying in wait, or any other premeditated murder, or in commiſſion of rape, burglary, &c. is ſtiled murder in the firſt degree, and puniſhed with death. Murder committed without previous deſign, but from implied malice only, as in the heat of paſſion, and the killing undeſigned, though without reaſonable provocation, with a weapon likely to kill, is murder in the ſecond degree, and puniſhed with confinement to hard labour.

3 *St. L.* 601. Manſlaughter, though diſtinguiſhed into voluntary and involuntary, in other reſpects remains here as in *England*: ſo that whatever would be manſlaughter there, is here alſo manſlaughter, either voluntary or involuntary: but here involuntary manſlaughter may be proceeded againſt as a miſdemeanor.

In this caſe, the killing is clearly more than man- 1794.
ſlaughter: for every unlawful killing is preſumed mur-
der, unleſs the perſon accuſed can ſhew ſuch circum-
ſtances, as will reduce it to a lower degree of homicide. The defendant has ſhewn no ſuch extenuating circumſtances; no provocation, no aſſault; nothing done by *Chadwick*, to leſſen the crime of *M'Fall*. Therefore the killing is clearly murder.

What facts conſtitute one kind of homicide or another, is a queſtion of law purely. Whether the facts exiſt; or whether they proceeded from ſuch a purpoſe; is to be aſcertained by the jury. When aſcertained, nothing remains but a queſtion of law to be decided by the court.

The facts here, which ſtand altogether uncontradicted, amount then clearly to murder. The queſtion is of what degree.

If of the firſt degree, it muſt be becauſe premeditated. It cannot come within any other of the definitions of murder of the firſt degree.

To make it premeditated, it is not neceſſary, that the deſign ſhould be *long* formed. If the deſign of killing be formed previous to the act, I am inclined to believe it is the true meaning of the law, that it is murder in the firſt degree.

Drunkenneſs does not incapacitate a man for forming a premeditated deſign of murder; but frequently ſuggeſts it. A drunk man certainly may be guilty of murder. But as drunkenneſs clouds the underſtanding, and excites paſſion, it may be evidence of paſſion only, and of want of malice and deſign. This I leave to you.

If you believe, that *M'Fall* returned to the door, with a purpoſe of killing *Chadwick*; or gave the ſtroke, with a purpoſe of killing *Chadwick*, it is murder in the firſt degree. If he had no ſuch previous purpoſe, ſtill it is murder, but of the ſecond degree.

The jury found him guilty of murder in the firſt degree. He received ſentence of death, and was hanged.

ALLEGHENY COUNTY,

March Term, 1795.

George Adams *v.* Roderick M'Kinney.

1795. THIS was an action of treſpaſs, for breaking the cloſe of the plaintiff, and treading and depaſturing the graſs in his meadow. There was evidence that *M'Kinney* had thrown down the fence, and turned his horſes into the meadow. It was proved, that the fence, though not what is called a *lawful* fence, or agreeable to the directions of the act to regulate fences, &c.; yet was generally what is called a *neighbourly* fence; and that *M'Kinney's* horſes were *breachy*.

2 St. L. 188.

Brackenridge, for the plaintiff. *Young*, for the defendant.

President. In *England*, the law is a fence round every man's ground, and treſpaſs may be maintained for paſſing over the uninclоſed ground of another againſt his will. There, as has been ſtated, on the principle, *ſic utere tuo, ut alieno non lædas*, every man muſt take care to keep his cattle from going on the land of another. In this country our circumſtances have led us to ſuppoſe, that every man muſt take care of his land, that the cattle of others go not on it.

It is not neceſſary now to ſay, whether treſpaſs could, or could not, be maintained, for treading down *uninclоſed* graſs, &c. or for treading down graſs, &c. incloſed by a fence *notoriouſly* bad, and ſuch as plainly could not keep off the cattle uſually running at large.

The 43d ſection of the late conſtitution of this ſtate, which gave general liberty to hunt on uninclоſed lands, if it could apply to the caſe before us, is not in the preſent conſtitution.

The act regulating fences gives a new and ſummary remedy for treſpaſſes on lands, incloſed with fences of the deſcription therein mentioned; but takes not away any remedy, which exiſted before and at the time of the paſſing of that act. The perſon injured, whoſe fences are of that deſcription, may proceed under that act, or at common law. And if the fences are not of that deſcription, the perſon injured, though he can have no remedy under that act, may have remedy at common law.

If fences, though not what are called *lawful*, be what are called *neighbourly*, and ſufficient to keep out cattle not *breachy*, I hold, that treſpaſs will lie: for the owners of miſchievous cattle ought to keep them from doing injury. But, whatever the fences be, whether good or bad, if a man drive his cattle over them into the field of another, treſpaſs will lie. 1795.

Verdict for the plaintiff, ten dollars.

WESTMORELAND COUNTY.

March Term, 1795.

JOHN KIRKPATRICK *v.* TURNBULL and MARMIE.

KIRKPATRICK brought an action of *indebitatus aſſumſit*, for 86*l.* 2*s.* 8*d.* for goods ſold and delivered. There were counts of *quantum valuerunt*; and *inſimul computaſſent*.

An account ſettled, 26th *June*, 1793, by the plaintiff and *Mr. Marmie*, and ſigned by *Marmie*, acknowledging a balance of 50*l.* 2*s.* 8½*d.* and an order of *John Probſt*, for 16*cwt.* of iron at 36*l.* alſo due, was given in evidence.

On which there was a verdict for 95*l.* 8*s.* 7½*d.* the amount of the ſettled account with intereſt from the ſettlement.

By conſent, this verdict, which was in abſence of the defendant, was ſet aſide; and the cauſe was tried again, at *June* term, 1795.

Woods, for the defendant, objected to one *item* in the ſettled account, a bill of 100 dollars, drawn by *Peter Marmie*, on his ſeparate credit, on *John Barclay* in *Philadelphia*, and returned proteſted. One partner can bind the others only in a partnerſhip tranſaction. We offer to prove, that this order was drawn by *Peter Marmie*, and not by the partnerſhip firm, *Turnbull and Marmie*; and that it was known to be ſo by the plaintiff, and therefore was not a ſubject of the ſettlement of a partnerſhip account.

1795.

Young, for the plaintiff, contended, that the account having been ſettled by the partner, as a partnerſhip account, evidence will not now be received, that any part of it was a ſeparate account. An admiſſion by one is an admiſſion by all.

Whitcomb v. Whiting, *Doug.* 652.

PRESIDENT. The queſtion really is, whether the defendants, as partners, may ſhew, that the plaintiff took a ſeparate account, known to be ſuch into a partnerſhip ſettlement; or whether the partner having the ſeparate account, by making a ſettlement in the partnerſhip name, can conclude the other partners, and make them liable for the ſeparate account. We are clear that the proof is admiſſible.

Mr. *Young* was then ſworn, and proved, that a proteſted bill, drawn by *Peter Marmie*, on *John Barclay*, was ſent up to him, from *Philadelphia*, to get the money from the drawer; that, by the directions of Mr. *Marmie*, he called on Mr. *Kirkpatrick* for the money, who declined payment (as he then conſidered himſelf in advance to the company) till ſome caſtings ſhould be ſent him from the furnace of *Turnbull* and *Marmie*, which *Kirkpatrick* conſidered as the fund out of which he was to advance the money; and that *Kirkpatrick* afterwards paid the money.

PRESIDENT. The ſettlement is, *prima facie*, evidence of the balance being due by the company to the plaintiff. But it is not always concluſive; and the other partners may ſhew, that the plaintiff has taken a ſeparate account of the ſettling partner into the ſettlement.

If *Kirkpatrick* advanced this ſum of 100 dollars to Mr. *Young*, in payment of *Marmie's* debt, on the credit of *Marmie* alone; it cannot be received as an *item* in the partnerſhip account, and muſt be ſtruck out of the balance. For the plaintiff and the ſettling partner have no right to make the company pay the ſettling partner's debts.

But if *Kirkpatrick* paid this ſum of 100 dollars, by the directions of *Marmie*, an acting partner of the company, as a payment for caſtings received from the company; it is a payment to the company. For they entruſted *Marmie* with the ſale of the caſtings, and the receipt and application of the money ariſing from ſuch ſale.

The jury found for the plaintiff, as before, for the amount of the ſettled balance, with intereſt. 1795.

GEORGE ARMSTRONG *v.* WILLIAM M'GHEE.

ARMSTRONG appearing diſguſted with a valuable horſe, that, after a hard ride, ſeemed jaded and lame, offered him for ſale to ſeveral perſons, for a trifle, and to *M'Ghee*, for 5*l*. *M'Ghee* agreed, and by *Armſtrong's* direction, took the horſe home to his ſtable. Both lived in *Greenſburgh*, and were on terms of intimacy. At the time, ſome ſuppoſed *Armſtrong* in jeſt. He ſaid ſo himſelf afterwards, and demanded the horſe back, as ſuppoſing *M'Ghee* underſtood him to have been in jeſt. However *M'Ghee* choſe to keep the horſe; and *Armſtrong* brought a replevin for him. *M'Ghee* claimed property, and retained the horſe. During the ſuit, the horſe died, having been very hard ridden, in a hot day, and drunk cold water.

Brackenridge and *Young*, for the plaintiff. A contract muſt have an agreement of the mind, underſtood by both parties. Inadequacy of price, known to the other party, is a ground to ſet aſide a contract. So is impoſition, as ſelling a horſe for a barley corn for the firſt nail, in his ſhoes, and ſo in a duplicate ratio for every other. A contract to be carried into effect, muſt be fair, reaſonable, and free from circumvention. 1 *Powel Contr.* 6 *Co.* 339.

Purviance and *H. Roſs*, for the defendant.

PRESIDENT. A contract may be made by any ſigns, which ſhew an agreement of mind, though there be neither words nor writing: if there be underſtanding, it may be made between two men deaf and dumb.

There is a difference between carrying into effect an incomplete contract, and annulling a complete one. When a court of Chancery is called on for its aid, to carry into effect an incomplete contract, they will, before they give that aid which the complainant requires, compel him to do equity. If *Armſtrong* had been over-reached, and the contract incomplete, perhaps a court of equity would not carry this contract into effect.

1795. The authority is merely miniſterial, and muſt be ſubject to control. The ſubject requires the ſolemnity of a court of record.

Commiſſioners of bankruptcy have powers like a court of record. They may impriſon, &c.; yet their acts are traverſable.

In moſt caſes of ſummary convictions, forms of conviction are preſcribed; why did not this act preſcribe a form, if it was intended that any act out of court ſhould be concluſive?

The law is careful of the perſon and intereſt of minors. It appoints guardians for them.

A conviction is neceſſary to recover the fine of 30*l.* under this ſection; *a fortiori*, to bind the innocent child. The court will ſurely not preſume what ought to be eſtabliſhed by a conviction.

The indenture does not even ſet out the neceſſary requiſites: it ſays not, that the father and mother *lived together under pretence of marriage.* The overſeers therefore ſhew no authority. It may have been an ordinary binding of a helpleſs orphan, and good only till 18 years of age. The petitioner has already ſerved 19 years; and that is ſufficient to indemnify the maſter.

Brackenridge. There are two parts of the puniſhment of the offence againſt this act; one is the fine of the parents, another the ſervitude of the child. There is no reaſon, why, becauſe the ſtate has not proſecuted for the one, the overſeers may not exerciſe their part of the duty. The two things are entirely ſeparate. The acts of a juſtice of the peace are frequently concluſive; as in caſes of debt under forty ſhillings, and in many convictions for the breach of penal laws.

We are to conſider this caſe, as if it were diſcuſſed the day after the binding, with all the prejudices then exiſting. The binding was not traverſable one hour after it was completed. If traverſable then, I admit, it is traverſable now.

PRESIDENT. Overſeers of the poor have a right to bind out children, who have none to provide for them, till, if females, they arrive at the age of 18 years, or, if males, at the age of 21 years; when, it is preſumed, they can provide for themſelves. This indenture is good till eighteen.

It is a ſettled point, that one man is not bound by the act of another, except as to rights claimed under that other. A verdict, &c. between two may be traverſed by a third perſon affected by it. 1795.

This woman, arrived at an age to provide for herſelf, calls for the authority of the maſter or the overſeers, to keep her longer in ſervitude. No authority is ſhewn, but the indenture. That, of itſelf, is not ſufficient, for a longer term, than till the woman bound arrives at the age of eighteen.

The woman was diſcharged.

FAYETTE COUNTY.

March Term, 1795.

William Betts *v.* George Death.

THE parties went down the *Ohio* river, to the *Cumberland* river and the *Southern-Territory*, on a joint trading adventure, with whiſky, flour, cider, &c. Diſputes ariſing between them, there was a reference to arbitrators, and an award in favour of *Death* and a ſuit before a juſtice, and judgment for 20*l. proc.* money, in favour of *Death*. They quarrelled; *Death* beat *Betts*, and, to avoid an arreſt in that territory, haſtily left it. After his departure, *Betts*, who was to remain and ſettle in the territory, brought a foreign attachment on his claim in their traffick, and, having proſecuted it to judgment, in the court of *Davidſon* county, brought an action here of *indebitatus aſſumſit* on that judgment, for 15*l.*13*s.*11*d.* money of that territory, equal to 15*l.*13*s.*11*d.* money of this ſtate.

A copy of the record was offered, containing a proceeding in a foreign attachment, in the court of *Davidſon* county, at the town of *Naſhville*, in the *Southern Territory*, reciting a *capias ad reſpondendum*, a return *non eſt inventus*, a foreign attachment, and ſummons to garni-

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1795. ſhees, their appearance, and confeſſion of property, one of ten ſhillings, and one of a dollar; judgment, that a plea of the defendant, entered by his attorney, was in error and void, becauſe not having replevied, he could not plead to iſſue; then proclamation for the defendant to come in and replevy; and, he not appearing, a judgment by default, a writ of enquiry, and damages found 10*l.* 1*s.* 3*d.* and coſts 5*l.* 12*s.* 8*d.*

Young, for the defendant, objected to this. A judgment on a foreign attachment is no proper evidence, as a foreign judgment. It is merely a proceeding *in rem.* The appearance of an attorney is without the knowledge of *Death*, and is void by the opinion of the court in which he appears.

1 *St. L.* 60. *Phelps v. Holker*, *Dall.* 261. *M Clennachan v. M Carty*, *Dall.* 375.

PRESIDENT. A judgment in a foreign attachment is not concluſive, but may be examined into. It is proper evidence in this caſe.

The record was then read.

PRESIDENT. A judgment in an action to which the defendant has appeared in a court of competent juriſdiction, is, with an exception of a foreign court, concluſive on the parties to it. A judgment in a foreign court is, *prima facie*, evidence, but may be diſproved. Perhaps the judgment of a court of another ſtate ought not to be conſidered as a foreign judgment. An attachment is *in rem*, not *in perſonam.* So far as the property attached, it is concluſive, under the precautions and proviſions of the act of aſſembly; beyond the property attached, the judgment may be queſtioned. So far, it correſponds with the views of juſtice and of the act of the aſſembly. Beyond that, making it concluſive would be contradictory to the rights of natural juſtice, which require that no man ſhall be condemned unheard, or be affected by a judgment, to which he was not a party, and had no opportunity of anſwering.

You will conſider whether the evidence given invalidates the recovery of the ſum found by the jury of inquiry on the foreign attachment, and the coſts, which are both included in the judgment ſtated in this declaration.

Verdict for the plaintiff 14*l.* 14*s.* 7*d.* damages.

Young, for the defendant, moved to ſet this verdict aſide, on the ground, that the proceedings on a foreign

attachment, in the *Southern Territory*, ought not to have been received in evidence of a debt; and on an affidavit, that in common dealings and public proceedings in that territory, when any ſum of money was mentioned, *proc.* money is meant, and that was rated at two for one. 1795.

The verdict was ſet aſide on the laſt point.

And, at *September* term, 1795, this cauſe was tried again; when, the evidence of the reference and hearing both parties on it, and of the award, appearing more ſtrongly for the defendant, the jury found a verdict for him.

PENNSYLVANIA *v.* JOHN GILLESPIE.

GILLESPIE was indicted for unlawfully, forcibly, and contemptuouſly, tearing down, and contemptuouſly refuſing to replace, an advertiſement, ſet up by the commiſſioners of *Fayette* county, of the ſale of lands there for arrears of county taxes.

PRESIDENT. For taking down an advertiſement of a ſale of property for private uſe, an action would, in my opinion, lie for contingent damages. It ſeems to follow, therefore, that, when the ſale is under a public law, for public uſe, an indictment ſhould lie for the injury done to the public. *Weller & al v. Baker*, 2 *Wils.* 414.

He was convicted.

WASHINGTON COUNTY,

March Term, 1795.

JAMES CAMPBELL *v.* JOHN CANON.

CANON gave *Campbell* a bond for the payment of money, with a warrant of attorney to confeſs *judgment*. A judgment had accordingly been entered, and, a year and day having expired without any execution, a

1795. *ſcire facias* was iſſued; but, to get an execution more quickly, this was diſcontinued, and another judgment entered on the warrant annexed to the bond, and execution on this ſecond judgment was iſſued. And now a motion was made to ſet aſide this ſecond judgment, and the execution on it, as irregular.

PRESIDENT. We think this warrant of attorney authoriſed the entry of only one judgment, and was ſatisfied by the entry of the firſt judgment. The ſecond judgment, and the execution on it, muſt, therefore be ſet aſide as irregular. But we hope the defendant will conſent that the diſcontinuance of the *ſcire facias* be alſo ſet aſide, that the plaintiff may proceed thereon to recover his money.

This was agreed to.

Ex parte WILLIAM M'DONALD, an inſolvent debtor.

1 *St. L.* 275. ROSS, for the plaintiff, in the ſuit on which *M'Donald* was in cuſtody, objected to the diſcharge of the priſoner; becauſe he had not reſided within this ſtate two years next before his impriſonment.

Pentecoſt, for the priſoner. The law was made to prevent inhabitants of another ſtate from coming here and becoming reſident in order to receive the benefit of the inſolvent laws here, which perhaps they could not obtain in the ſtate whence they came. But this priſoner was an inhabitant of *Virginia*, at the time of the arreſt, and of the contract, and long before. He had, before his arreſt here, been arreſted for the ſame demand in *Ohio* county where he reſided, and the ſuits there were diſcontinued, after his arreſt here.

PRESIDENT. As the circumſtances of this caſe carry no appearance of colluſion, or fraud on the law, on the part of the priſoner, but rather of oppreſſion by the plaintiff, we think it fair to conſtrue the 4th ſection of the inſolvent law of 1731, in the manner contended for by the priſoner's counſel, and, of courſe, to conſider the priſoner as not within the evil provided againſt, by that ſection.

1 *St. L.* 275. *See* 2 *St. L.* 688-9. 3 *St. L.* 181, 472-3.

FAYETTE COUNTY,

June Term, 1795.

PATRICK ELLIOT for the uſe of JONATHAN HILL *v.* SAMUEL MILLER.

1795.

JOHN SUNTLIN gave a ſingle bill, dated 25th *March*, 1786, for the payment of 25*l.* to *Samuel Miller*, or his order, heirs, or aſſigns. *Samuel Miller* aſſigned this bill to *Patrick Elliot*, by an indorſement on it, as follows, "I aſſign over my right and title to the within note to *Patrick Elliot*" (then interlined with other ink) "for value received, witneſs my hand and ſeal, this 25th *March*, 1786, *Samuel Miller*," (with a ſeal annexed.) To this aſſignment, three other names were added, probably intended as witneſſes, but a ſeal was annexed to each name. This note being afterwards aſſigned without ſeal in the preſence of two witneſſes, this action of covenant was brought againſt the original obligee, the firſt aſſignor, on his aſſignment. The declaration, ſtating the note, and alſo, the money being unpaid, the aſſignment to *Elliot*; ſtated a covenant by *Miller*, that the money ſhould be paid, and an averment, that it had not been paid by *Suntlin*, whereby action accrued to *Elliot*, to demand of *Miller*, the ſaid ſum of 25*l.* It then averred a demand on 1ſt *October*, 1786, and a refuſal.

Young, for the defendant, referring to the caſe of *Cummings v. Lynch*, with the caſes therein recited, objected, that the aſſignment, containing no expreſs promiſe, that the money ſhould be paid, was not evidence to ſupport this declaration on an expreſs covenant. *Dall* 415.

The plaintiff ſuffered a nonſuit.

WASHINGTON COUNTY,

June Term, 1795.

WILLIAM KERR *v.* JAMES WORKMAN.

1795. THERE was a diſpute between the parties about the property of two hogs, which both claimed, and *Kerr* killed. At *December* ſeſſions, 1792, in *Waſhington* county, *Workman* procured a bill of indictment to be ſent up and found againſt *Kerr*, for ſtealing the hogs. When, at a ſubſequent ſeſſions, this indictment was propoſed to be tried, the attorney for the ſtate gave up the proſecution, declaring that the evidence would not ſupport an indictment for larceny, however it might ſupport an action of treſpaſs; and he entered a *nolle proſequi*. *Kerr* then brought an action on the caſe for a malicious proſecution. At the trial of this action, it was proved, that, before the bill for larceny was ſent up, *Workman* had been repeatedly informed by the attorney for the ſtate, and by others to whom he applied, that an indictment was not the proper remedy, but an action only; yet he perſiſted in proſecuting for ſtealing.

PRESIDENT. As it has been ſaid, that in an indictment for murder, I will ſay, that in a declaration for a malicious proſecution, or in ſtating, that expreſs malice is neceſſary generally to ſupport it, I apprehend the word *malice* has a technical meaning, and is not to be conſidered, as in the common converſation or claſſical ſenſe. Any proſecution carried on knowingly, wilfully, and wantonly or obſtinately, for no purpoſe or end of juſtice or redreſs, but merely to the vexation of the perſon proſecuted, I conceive to be malicious.

The finding of the grand jury, that a bill is true, ought not to be conſidered as ſufficient to ſhew probable cauſe, if ſuch finding was on the evidence of the defendant in this action.

Verdict for the plaintiff, 12*l.* 10*s.*

JAMES HOOK *v.* EDWARD ROBISON.

THIS was an action of *indebitatus aſſumſit* for 50*l.* had and received. 1795.

Young, for the plaintiff, offered to prove, that *Hook* and *Robiſon* exchanged horſes, *Hook* giving with his horſe 8*l.* That, it afterwards appearing, that the horſe which *Hook* had received from *Robiſon*, having been ſtolen from one *Rhinberger* in *Maryland*, was reclaimed by him, *Hook* had given him up to the owner, and now brought this action, to recover the money which he had given to *Robiſon*, and alſo the further ſum of 26*l.* *Virginia* money, which, he propoſed alſo to prove, *Robiſon* had afterwards received, for the horſe he got from *Hook* and ſold to another.

Woods and *Purviance*, for the defendant. The action is for *money* had and received, we cannot admit evidence of a *horſe* had and received.

PRESIDENT. The evidence is clearly proper and muſt be admitted.

The evidence was then given, as ſtated.

Woods. The plaintiff, having given up the horſe to *Rhinberger*, without any verdict or ſuit, has no right to call on the defendant now for the value of him; as it has never been eſtabliſhed, that the defendant had not a good title to him, at the time of the ſale. No man's property ſhall be taken from him, but by trial by jury. Were it otherwiſe, the plaintiff's cruel and indelicate treatment of the defendant, in having him indicted for a felony of which he was acquitted,* ought to prevent any recovery by him, and ſubject him to the coſts of the proſecution. The acquittal on this indictment is evidence, that the defendant had the property of the horſe.

Young, for the plaintiff. *Hook* had his option to conteſt the property of the horſe with *Rhinberger*, or give up the horſe, and ſue *Robiſon*. We are not now trying an action for a malicious proſecution.

* *Robiſon* had been indicted in *Waſhington* for ſtealing *Rhinberger's* horſe, and acquitted, chiefly for want of *Rhinberger's* teſtimony to prove that the horſe was really ſtolen; ſo that it appeared only that he was claimed by *Rhinberger* as ſtolen from him.

1795. PRESIDENT. 1. It is true, the plaintiff might have kept the horſe, till *Rhinberger* compelled him by law to give him up. But then he muſt have run the riſk of paying the coſts of that law ſuit, and of never recovering this additional loſs from *Robiſon*. His not taking this method is no injury to the defendant; for he may now prove, that the horſe was his; and, if he do ſo, *Hook* will recover nothing.

2. You ought not, in this collateral action, to puniſh *Hook* for a malicious proſecution. *Robiſon* may ſeek his remedy for that, and if he think it proper, perhaps yet will. If he do, *Hook* muſt anſwer or pay for it. Now, he is not obliged to explain it. Your making him pay now, might be making him pay twice.

ON CERTIORARI.

PROCEEDINGS of a juſtice of the peace in three or four actions for debts before him, having been removed by writs of *certiorari*, the judgments and proceedings were ſet aſide; becauſe the ſummonſes did not ſtate any day, on which the defendants ſhould appear before him.

ALLEGHENY COUNTY,

September Term, 1795.

Leſſee of JAMES HAMILTON *v.* ANDREW M'CULLOCH.

THIS was an ejectment for 306 acres in *Verſailles* townſhip, *Allegheny* county.

Woods, for the plaintiff, ſhewed a warrant to *James Hamilton*, dated 16th *July*, 1787, for 300 acres of land, called the *Whiteoak-Level*, adjoining lands of the heirs of *M'Kee*, deceaſed; a ſurvey on this warrant made 11th *October*, 1787, of 306 acres and 133 perches, and the allowance; and a patent dated 11th *March*, 1788. He then

ſhewed a deed from the ſheriff of *Weſtmoreland* county, (which then included the land) dated 2d *Auguſt*, 1785, to *James Hamilton*, for 300 acres of land ſold for 53*l.* on an execution againſt *James Thomſon*, joining lands where *James Thomſon* lives. This is the ſame land for which the patent was given on the warrant and ſurvey, and is the land now claimed by the plaintiff. 1795.

It was then proved, that this land, which was known by the name of the *Whiteoak-Level*, had been claimed by *James Thomſon*, and ſold, as ſtated, to *Hamilton*, on a judgment againſt *Thomſon*, in *Weſtmoreland* county, in which the land then was. When *Hamilton* bought the land from the ſheriff, he aſked *John M'Kee*, (who lived near the land, and from whom *M'Culloch* derives his title) what he thought of the land, whether it was good, and whether there was any diſpute in it. *M'Kee* told him it was good, there was no diſpute in it, it had always been known as *Thomſon's*; and offered his ſervice to *Hamilton* in renting or ſelling it. Afterwards a friend of *Hamilton's* hearing that *M'Kee* intended to take a warrant for this land in his own name, got an application and certificate made out in the name of *Hamilton*, and ſent them down to *Carliſle*, where *Hamilton* lived, adviſing him immediately to take out a warrant. It was further proved, that adjoining this land, and the land on which *John M'Kee* lived, one *Goban*, brother-in-law of *M'Kee*, had, in 1770, made a ſettlement, and lived on it twenty-one years. *Goban* never claimed any part of the *Whiteoak-Level* tract, round which there were old lines, though there was no improvement on it. *John M'Kee* his father, and brothers, claimed the other land round *Goban's* farm, ſo that his claim was circumſcribed to about ſixty or ſeventy acres. This *Goban's* heirs ſold to *John M'Kee* in 1786, for 25*s. per* acre. *M'Kee* went round *Goban's* claim, and found the lines between it and the *Whiteoak-Level* tract. *Goban's* improved land does not touch *Hamilton's* lines. In 1788, *M'Kee* took out a warrant in the name of *Hugh Goban*, and on it ſurveyed the *Whiteoak-Level* tract, together with *Goban's* claim; and afterwards ſold part of the land to *M'Culloch*.

Young, for the defendant, ſhewed a warrant to *Hugh*

1795. *Goban*, dated 22d *February*, 1788, for four hundred acres, including an improvement, joining lands of *John M'Kee*, *James Thomſon*, and others, in *Huntington* townſhip, *Weſtmoreland* county; a ſurvey of three hundred and ſeventy-four acres, and twenty-four perches, made 19th *March*, 1788; a patent dated 8th *June*, 1788; a conveyance from *Hugh Goban* to *John M'Kee*, for 78*l.* dated 29th *June*, 1788; and a conveyance from *John M'Kee* to *Andrew M'Culloch*, of two hundred and twelve acres, dated 20th *May*, 1789.

Young, contended, that *M'Culloch*, as a *bona fide* purchaſer without notice ought to be maintained in the poſſeſſion of this land.

PRESIDENT. There is no evidence, that the diſputed land was ever within the claim of *Goban*: it was always in the claim of *Thomſon*. *Goban* might confine his claim within as narrow bounds as he pleaſed. He did confine himſelf, on the ſide next the *Whitecak-Level* tract. What claims he might have, or how he might urge or diſpute them, on any other ſide, or how much he might have ſold to others, we know not. It ſeems he ſold to *M'Kee* 60 or 70 acres, and never claimed any part of the *Whiteoak-Level* tract. *Hamilton* bought the only claim then known to it. He had a right to take out a warrant for it. He took out the firſt warrant for it. His title is complete. *Goban* had no equitable title to it. And *M'Kee's* legal title, being poſterior to *Hamilton's*, is void. *M'Culloch*, therefore, purchaſed a void title, and whether *bona fide* or not, can derive no right under it.

Verdict for the defendant.

PENNSYLVANIA *v.* NORRIS MORRISON, CHARLES CRAIG, ADAM CRAIG, JOHN M'WILLIAMS, THOMAS WHITE, HUGH TORRENCE, ALEXANDER M'COMBS, and PATRICK PRESTON.

THESE men were indicted for having, on 18th *Auguſt*, 1794, unlawfully, riotouſly, and routouſly aſſembled together, to diſturb the peace, and, in *Market Street* in *Pittsburgh*, raiſed a pole or ſtandard, called a

liberty-pole, in defiance of the laws of the ſtate of *Pennſylvania*, and of the *United States*, and as an indignity and 1795.
inſult to the honourable *James Roſs*, *Jaſper Yeates*, and *William Bradford*, Eſquires, commiſſioners on behalf of the *United States* of *America*, and the honourable *Thomas M'Kean* and *William Irwin*, Eſquires, commiſſioners on behalf of the ſtate of *Pennſylvania*, to confer with the citizens of the counties weſt of the *Allegheny* mountains; to the great diſturbance of the peace, and to the ill example of others.

Woods, for the defendants. Theſe men acted under force, as thoſe had done, who went from *Pittſburgh* to the meeting at *Braddock's-Field*. They had no view to oppoſe the government. Many did not ſign the terms of amneſty, becauſe they ſuppoſed themſelves innocent. It was not the intention of the defendants to oppoſe the laws, but to ſave the town from violence.

PRESIDENT. *Thomas White* muſt be acquitted: there is no evidence againſt him. *John M'Williams* has ſigned the amneſty.

You have no evidence of any conſtraint from a mob from the country, but in the declarations of the defendants themſelves. This is not like the caſe of *Braddock's Field*, where five or ſix thouſand men were aſſembled, and threatened the town. There muſt be firſt ſome evidence, that violence was threatened, and danger exiſted, to the town, before they can found any excuſe for their conduct, on this ground.

Pole-raiſing was a notorious ſymptom of diſſatisfaction, and the exhibition of this, in the only part of this country, where government was ſuppoſed to have ſtrength, muſt have made an impreſſion very unfavourable to the whole country, promoted violence in the people here, and induced force on the part of government.

All the evidence of their acting under dureſs, is their ſaying ſo. It is, at leaſt, as probable, that this was a cover for their real motives, an oppoſition to the civil authority. Why did not theſe men ſign the amneſty, when almoſt every man beſides in the town ſigned it? They ſurely refrained not from a conſciouſneſs of innocence. It is ſomewhat ſingular, if danger then exiſted, that the only men in this town anxious for its ſafety,

1795. were men of little or no property in it; and that then all the men of property were againſt this meaſure. When there was real danger, all the town went to *Braddock's-Field*.

The act of raiſing a pole in the ſtreet is itſelf unlawful, independent of any other ill intention. The probability is, that the intention was an unlawful oppoſition to the government, and that the excuſe was feigned, to cover their real deſigns.

Verdict guilty, except as to *White* and *M'Williams*.

SAMUEL BARR *v.* DAVID HILL.

THIS was an action on a promiſe to give the plaintiff an hundred acres of land, a cow, and plow-irons, if he would marry *Iſabella Hill*, his niece. The marriage took place, againſt the will of the woman's father. And the promiſe was proved in ſubſtance, partly from converſations before, and partly from declarations after the marriage.

Roſs, for defendant, contended that the promiſe was not binding.

PRESIDENT. The contract is valid, the conſideration good, and the conduct of the defendant faithleſs and immoral. You will conſider his declarations as explanatory of his contract made with *Barr*. Damages ought to be ſuch as may compel a ſpecific execution of the agreement.

Verdict for the plaintiff, 150*l*.

WESTMORELAND COUNTY,

September Term, 1795.

PENNSYLVANIA *v.* JACOB CRIBS, DANIEL HAROLD, and eleven others.

1795.

THEY were indicted for a riot, committed 3d *September*, 1794, in beſetting the doors and windows of the houſe of *Simon Drum*, in the town of *Greenſburgh*, throwing ſtones, &c. at the doors and windows, with intent to beat, wound, tar and feather, and evilly intreat *Jaſper Yeates* and *William Bradford*, commiſſioners on the part of the *United States*, and *Thomas M'Kean* and *William Irwin*, commiſſioners on the part of the ſtate of *Pennſylvania*, to conſer with the citizens weſt of the mountains.

PRESIDENT recapitulated the teſtimony, and diſtinguiſhed between thoſe, againſt whom there was evidence, and thoſe, againſt whom there was not.

Collecting a party, for any purpoſe of a violent tendency, ſo directly leads to miſchief, that it renders the authors guilty of all conſequences plainly to be foreſeen.

A report had generally prevailed, that the commiſſioners, on their return, would be chaſed out of the town.

This was told to *Cribs* and his party. They were urged to aſſiſt in it. And, after all, proceeded, in a body, at the dead of night, to the houſe where the commiſſioners ſlept. For what purpoſe could they go?

Acts of extreme violence, as robbery, are often committed under a very civil appearance.

No matter how reluctantly a man commits a crime, it is ſtill a crime, though leſs aggravated.

It is a riot, if a number of people aſſemble in a town, in the dead of night, and by noiſe or otherwiſe, diſturb peaceable citizens.

If perſons aſſemble together, for an unlawful purpoſe, every man is guilty of all acts done in execution of, or contributing or tending to, that purpoſe. If they meet, for a lawful purpoſe, and proceed to an unlawful act, it is a riot.

Nine were convicted, and four were acquitted.

FAYETTE COUNTY.

September Term, 1795.

JOHN MULLEN *v.* NOAH RIDGEWAY.

1795. ON the trial of an action on the case, *indebitatus assumsit*, for work done, &c. There was evidence given of work done, and of the sale of a horse, in *New Jersey*; and also that *Ridgeway*, while in prison for debt, in that state, having petitioned for relief, under the insolvent law of that state, gave in a debt due by him, on an unsettled account, to *John Mullen*. This was in *February*, 1786, and the action was brought to *March* term, 1793. *Ridgeway* was discharged under the insolvent law; and, soon after, left the state of *New-Jersey*, and came into this country. The plaintiff continues to live in *New-Jersey*.

1 *St. L.* 95. *Robison vs. Bland*, 2 *Burr.* 1077. 1 *Esp.* 152.

Ross, for the defendant, relied on the plea of the statute of limitations, and stated that every man must recover, according to the laws of the country where he sues.

Purviance, for the plaintiff, relied on the exception, which, he contended, applied to persons going out of the state, to reside.

PRESIDENT. It will be best to reserve this point, and let a verdict be taken for the plaintiff, subject to a nonsuit on the reserved point.

This was done. And, at a subsequent term, judgment was given for the plaintiff on the verdict, not only on the ground of the defendant having left the state, where the transactions between the parties had been; but because the defendant, on his petition for discharge by the act of insolvency, had stated himself as a debtor to the plaintiff; and because it would be hard to oblige creditors, after such discharge, to commence and renew actions every five or six years, merely to keep the debt alive, though there was no prospect of getting property of the debtor's. It would seem proper, after an insolvency, to suspend the limitation of actions, to be brought by all creditors returned on the petition, till the debtor was notoriously to his creditors in a solvent state.

WASHINGTON COUNTY.

January Term, 1796.

PENNSYLVANIA *v.* SAMUEL LEWIS, CHA. HOBBES, ISAAC HOBBES, NATHAN LEWIS, and ISAAC BRADEN.

THIS was an indictment for the murder of *John Weſton.* 1796.

On the 5th *November*, 1795, there was a wedding at *Weſton's* houſe. The priſoners went there without invitation (except as to one of them). *Weſton*, who ſeems to have entertained ſome ſuſpicions of them, told them, they were welcome, if they behaved themſelves well.—Nothing improper appeared till the evening, when the company were dancing in an out-houſe. Then the priſoners began to be troubleſome; ſhoved the dancers off the floor; fought ſham-battles among themſelves; and broke up the company. They ſtood in a row againſt *Weſton*, who was an old man of ſeventy-three years of age; and, puſhing one againſt another, puſhed him againſt the wall. He complained that he was hurt; and deſired them to deſiſt. They ſeem to have done ſo then, but to have repeated this conduct, or ſomething like it ſeveral times; and the old man was ſeveral times thrown on the floor; and, at leaſt once, they ſeem all to have fallen above him. *Weſton* left the out-houſe, and came into the dwelling-houſe, and ſhut the door. They burſt it open with violence againſt the ſide of his head; came in, and mocked *Weſton*; puſhed him and his wife off chairs;—and, after they went out of the houſe, threw ſtones, &c. in through the openings, and down the chimney. The old man again went out to remonſtrate with them; and, when he returned into the houſe, ſaid *Iſaac Braden* and *Iſaac Hobbes* had thrown him down off his porch, and kicked him. They ſeem to have continued there all night, and part of next day. In the morning of next day *Weſton* walked about as uſual, but occaſionally lay down on his bed, and complained of being ſore. In the even-

1796. ing he went to bed, and continued in it. That evening and the ſecond day, he complained " that his inſide was *battered to a jelly*, by the kicks and bruiſes given him by thoſe fellows," meaning the priſoners ; ſpit blood ; was altogether unable to riſe, ate nothing from the time of the beating, and drank nothing but water ; and on the third day he died. The priſoners ſtuck together as a party by themſelves, and ſeemed all equally to participate in the acts of violence. There were marks of bruiſes on one ſide and thigh of *Weſton*.

Campbell, *Pentecoſt*, and *Brackenridge*, for the priſoners, made two queſtions.

1. Was the death occaſioned by the acts of the priſoners ?

2. Were thoſe acts done with the premeditated intention of cauſing the death of *Weſton*.

1. The cauſe of the death is altogether doubtful, whether intoxication, old age, or violence. If it be doubtful, you will acquit.

2. Theſe men did nothing more than an uſual frolic, according to the cuſtom and manners of this country. There was no intention of hurt, no deſign of miſchief, in which the malice, which is a neceſſary ingredient of murder, conſiſts.

3 *Bac.* 665, 677.

The act of aſſembly diſtinguiſhes murder into two degrees. It is not murder in the firſt degree ; for there is no evidence of any previous intention of killing. It is not murder in the ſecond degree ; for there was no malice, no intention of injury, and the unlawful act was not a felony, but a treſpaſs, and the killing therefore is no more than manſlaughter.

4 *Comm.* 192-3.

In either way, therefore, the priſoners muſt be acquitted of murder. If their acts did not occaſion the death of *Weſton*, they are clear of all crime. If it be doubtful whether their acts occaſioned his death, the common preſumption of innocence will lead you to acquit. If their acts did occaſion his death, and though their acts were unlawful, yet, being no felony, but a treſpaſs, and without malice or intention to hurt, it is not murder. So that, at moſt, it can be but manſlaughter. But, I think, you will ſay, it was not even that ; but that the death was the conſequence of intoxication, and the infirmities of age. His wife died in a day or two after

him. The priſoners might as well be indicted for murdering her. 1796.

Young, for the ſtate, recapitulated and obſerved on the teſtimony accurately and minutely.

It is clear, that the death of *Weſton* was occaſioned by the violence of the priſoners. You have heard, that *Geoffry Lewis*, brother of two of the defendants, ſaw the dead body with the bruiſes on it, and expreſſed his apprehenſions, that theſe men would be hanged. Why did they not bring him forward.

We have no cuſtom in this country of killing old men at weddings. The *Indians* have a cuſtom of killing one another when drunk; and if we indulge ſuch practices, as have appeared in this caſe, we ſhall ſoon be as barbarous, as the ſavages of the wilderneſs.

He who wantonly does an unlawful act, likely to occaſion the death of another, is guilty of murder. Malice is a heart regardleſs of ſocial duty, and fatally bent on miſchief.

The priſoners came to *Weſton's* houſe, and were hoſpitably received. But inſtead of having their hearts ſoftened by ſuch kindneſs, they continued their abuſe of a poor old man, in his own houſe, againſt his repeated remonſtrances, till by the violent and repeated injuries, they occaſioned his death.

If they were for fighting, why not attack young perſons like themſelves. It is equally felony, to kill a drunk man, as to kill a ſober man. If age may be killed by ſmall violence, lawfully, ſo may infancy. Both ought to be peculiarly protected.

PRESIDENT went over the teſtimony and ſtated the ſubſtance of the caſe.

The firſt queſtion for you to determine is whether any act of the priſoners, or any of them, to which the reſt ſtanding by gave their countenance and aſſiſtance, cauſed the death of *John Weston*. If it did not, there is an end to any further queſtion; there is no homicide; and the defendants muſt be acquitted. If there be a reaſonable ground of doubt, you will alſo acquit them.

The evidence was then applied to each of the priſoners.

Weight is due to the declarations of a dying perſon, after the mortal blow has been given. Relative to this,

1796.

there is a fine repreſentation by lord chief baron *Eyre*; "Now the general principle, on which this ſpecies of evidence is admitted, is, that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falſehood is ſilenced; and the mind is induced by the moſt powerful conſiderations to ſpeak the truth: a ſituation ſo ſolemn and ſo awful is conſidered by the law, as creating an obligation equal to that which is impoſed by a poſitive oath adminiſtered in a court of juſtice."

Woodcock's caſe. Leach 442.

But if it appear to you, that any act of violence, committed by the priſoners, cauſed the death of *Weston*, it will remain for you to conſider, with our aſſiſtance in points of law, what name the law gives to this act or acts of violence cauſing the death.

The ſame conſideration will remain, from whomſoever of the priſoners this act of violence came: for they appear all to have been of one party in this outrage; all preſent and either acting or aiding and abetting, therefore, all guilty as principals in the crime.

It makes no difference, though the violence was ſmall, ſuch as would not have killed a ſtrong or healthy man. If it ſhorten life a day, it is the ſame as if it ſhortened it ninety years. It would be the ſame thing, if the perſon killed had had a mortal diſeaſe on him. All muſt die ſome time: and ſhortening life is taking it away. Weakneſs and old age ought to be particularly guarded from injury, and treated with tenderneſs.

By the law of *England*, all unlawful killing is preſumed murder, until ſome extenuating circumſtances are ſhewn by the priſoner, leſſening the degree of the offence to ſomething lower than murder. Malice is preſumed, till want of malice is ſhewn. For the law holds the perſon of a man ſacred.

Foſter 255.

Malice is expreſs or implied.

Malice is implied from the outrageous circumſtances of the act ſhewing a cruelty of diſpoſition, a heart regardleſs of ſocial duty, and fatally bent on miſchief.—Malice is a technical expreſſion, and means the abſence of any excuſe of homicide.

Foſter 256-7. 4 Comment. 199.—2 Roll. 461.—2 L. Ray 1487.

But I apprehend, by our act of aſſembly, an unlawful killing, though it may be preſumed *murder*, will not be

3 St. L. 599.

1796.

presumed murder *in the first degree*. It appears to have been the intention of the legislature to distinguish between malice express and implied; and to leave the punishment of death to the cases of express malice there mentioned; and, for that killing, which involves only implied malice, generally, the act provides the punishment of imprisonment and labour.

It is not necessary, in order to imply malice, that there should be an intention of killing. If the act of killing be unlawful, with the intention of hurting the deceased or any other person; if it have a natural tendency to bloodshed, or if killing be the probable or apparent consequence; malice is implied. If a man do an act which apparently must do harm, with an intent to do harm, and death ensues, it will be murder. 1 *Hawk.* 127-8.—*Foster* 258.—4 *Com.* 192 3.—2 *L. Ray* 1488.

According to the law cited by the counsel for the prisoners, it might have been but manslaughter, if they had killed one of themselves *sham-fighting* by consent. But the violence to the old man was without his consent, and contrary to his remonstrance. 1 *Hale* 472-3.

If appearance of sport will exclude the presumption of malice, sport will always be affected, to cover a crime.

If the death was occasioned by the violent acts of the prisoners, and if those acts were done, with a design to kill, it is murder in the first degree; and if done without a design to kill, if with a design to hurt, and tending to bloodshed or death; it is murder in the second degree; if without such intention, it is manslaughter.

The jury returned with a verdict finding them guilty of murder in the *lowest* degree; and being informed, that unless they meant manslaughter, this was a conviction of murder in the second degree. They said they had considered the distinction between murder and manslaughter, and thought this was murder: and if there was no degree lower than the second, they found them guilty of murder in the second degree.

They were sentenced to an imprisonment of five years.

PENNSYLVANIA *v.* ABERILLA BLACKMORE.

1796. ON application to me, a writ of *habeas corpus* was directed to *Aberilla Blackmore*, returnable before me, for *Caſſandra* and *Lydia*, two *Negro* women, whom ſhe held as ſlaves. At the return of the writ, the claim appeared to turn on this queſtion, whether *Samuel Blackmore*, late huſband of *Aberilla*, was an inhabitant of the county of *Weſtmoreland*, on 23d *September*, 1780. This being a queſtion involving facts aſſerted and denied, it was agreed, that this ſhould be put in the form of an iſſue, and be tried in the court of Common Pleas. It was accordingly tried this term; and it was agreed, that the jury ſhould return a ſpecial verdict, to be drawn up by me. The object of the counſel for *Aberilla Blackmore* was, to have the proceedings removed into the Supreme court, for the opinion of that court on the facts found. Afterwards I propoſed, and it was agreed, that, inſtead of a ſpecial verdict, there ſhould be a ſpecial return to the *habeas corpus*, ſtating all the facts found by the verdict; and that the cauſe ſhould go up to the Supreme court, on a *certiorari* directed to me, in this ſhape, of the writ and return only.

See act of Aſſembly, 13th April, 1782.

The return was as follows:

"In obedience to the within writ, I have here *Caſſandra* and *Lydia*, as within required; and as the cauſe of their being taken and detained, I certify and return;—That the ſaid *Caſſandra* and *Lydia*, *Negro* women, were ſlaves to my deceaſed huſband, *Samuel Blackmore*, in the ſtate of *Maryland*, where he lived, and they with him, as part of his family, before and in the month of *March*, in the year of our Lord one thouſand ſeven hundred and eighty. That in *March*, 1780, he came into the then county of *Weſtmoreland*, in the ſtate of *Pennſylvania*, to purchaſe land; and on the 24th day of that month, purchaſed a tract of land, then in the county of *Westmoreland*, but now in the county of *Waſhington**, and ſtate of *Pennſylvania*, for 22,000*l.* continental money; and gave his bond for this money, which he afterwards paid. That returning to *Maryland*, where his

* *Waſhington* county was erected 28th *March*, 1781.

family ſtill remained, he told one of his neighbours, who was then about to remove, and, in *April*, 1780, did remove thence into the county of *Weſtmoreland* aforeſaid, that he ſhould have a certain part of this land; bade him put a fall crop in, if he did not get there in time himſelf; gave him apple-trees to plant; and ſaid he would be out there himſelf in *September*. That having ſold his land in *Maryland*, he, about the middle of *December*, and not before, arrived with his family, at the land which he had bought, then in *Weſtmoreland*, now in *Waſhington* county, in *Pennſylvania*. *Lydia* was then with him, and *Caſſandra* had been ſent up about two weeks before, with two of his ſons. That from that time, till his death, he continued to reſide on this land, with his family, keeping *Lydia* and *Caſſandra* part of it as ſlaves. That 'an act to redreſs certain grievances within the counties of *Weſtmoreland* and *Waſhington*,'* paſſed 13th *April*, 1782, enabling certain inhabitants of thoſe counties to regiſter their ſlaves, he regiſtered *Caſſandra* and *Lydia*, with the clerk of the peace of *Waſhington*, on the 19th day of *December*, in the year of our Lord, one thouſand ſeven hundred and eighty-two, as follows: (to wit)† '*Samuel Blackmore*, of townſhip. *Caſs.* a *Negroe* ſlave, twenty-two years. *Lyddy*, a *Negroe* ſlave, twenty years.' By virtue of which they are and were claimed and held as ſlaves, in the ſtate of *Pennſylvania*. And this is the cauſe of their being ſo kept and detained. 1796.

ABERILLA BLACKMORE."

The proceedings having been removed into the Supreme court, it was agreed, by the counſel on both ſides, that the validity of the return ſhould be argued at the next court of *Niſi prius*, in *Waſhington*, and the determination of the claim be made, by the judges then attending.

Accordingly, it was argued before *Yeates* and *Smith*, judges of the Supreme court, on 18th *May*, 1797, at a court of *Niſi prius*, at *Waſhington*.

* This law is not publiſhed in *Dallas's* edition of the ſtate laws.

† The form of the regiſtration was made part of the return, on the application of Mr. *Reſt* at the argument.

1796. *Brackenridge*, for the sufficiency of the return, read the act for the gradual abolition of slavery; and the act, of 13th *April*, 1782, to redress certain grievances within the counties of *Westmoreland* and *Washington*; and the act confirming an agreement entered into between this state and the state of *Virginia*; and made two questions.

1 *St. L.* 838. 2 *St. L.* 55. 2 *St. L.* 207.

1. Whether the act of 13th *April*, 1782, relates to inhabitants within the counties of *Westmoreland* and *Washington*, at the date of the act, or on the 23d *September*, 1780, when the agreement between the two states was closed.

2. Whether *Blackmore* was an inhabitant of *Westmoreland* county, on 23d *September*, 1780.

He contended that, by the purchase of a tract of land, sending up apple-trees, &c. he became an inhabitant.

As to registration, the abolition act is directory only: provided the truth be, that the persons are registered, mere formalities are not regarded. It is a law taking away property, and will be construed liberally in favour of the owner not of the slave. In 1780, this country was considered as *Virginia*, and its inhabitants as not bound by laws of *Pennsylvania*.

Ross, against the return. The abolition act provided against *any* introduction of slaves after the date of the act. All brought in after the act, instantly became free; all born after the act, are declared free at the age of twenty-eight; and the registration of slaves then within the state is secured by the penalty on the owner, of loss of property in any not registered according to the directions of the act.

1 *St. L.* 839, 840, 841.

The two *Negroes* in question, having been brought into this state after the 1st of *March*, 1780, are free, because not within the state on 1st *March*, 1780, nor, if within it, recorded before 1st *November*, 1780. The act of 13th *April*, 1782, reciting that "many of the inhabitants of *Westmoreland* and *Washington* counties, conceiving themselves under the jurisdiction of *Virginia*, had no opportunity of entering or registering their slaves, agreeably to the act for the gradual abolition of slavery," enacts, "that it be lawful for all such inhabitants of the said counties, who were, on the 23d of *September*, 1780, possessed of *Negro* or *Mulatto* slaves, or servants until the age of thirty-one years, to register such slaves or

ſervants, agreeably to the directions of the act aforeſaid, for the gradual abolition of ſlavery, on or before the 1ſt day of *January* next; and that the maſter or maſters, owner or owners, of ſuch ſlaves or ſervants, ſhall be entitled to his, her, or their ſervice, as by the ſaid act is directed; and the ſaid ſlaves or ſervants ſhall be entitled to all the benefits and immunities in the ſaid act contained and expreſſed." 1796.

But this act cannot make thoſe *ſlaves*, who were free under the act of *March*, 1780. And theſe women, having been brought in, after the 1ſt *March*, 1780, were free inſtantly after their being brought in. If they became free inſtantly after they were brought in, they remain free; for it is not in the power of any law, to make a free man a ſlave.

The object of the 5th ſection of the abolition law was to deſcribe the ſex and age of the ſlave, and the trade and reſidence of the maſter, ſo particularly, that ſlaves might, at any time, be certainly traced back. For this purpoſe, the directions of the act muſt be ſtrictly complied with. But in the regiſtry under which this claim to ſlavery is ſupported, there is no townſhip, diſtrict, or profeſſion of the maſter, nor ſex of the ſlave. One of theſe *Negroes* is named *Caſs*: This leaves it uncertain whether the perſon be man or woman, or the name *Caſſius* or *Caſſandra*. Strong indeed muſt be the leaning againſt liberty, if without any thing on the record to determine, this court ſhall ſay, that it was this woman *Caſſandra*, who was then regiſtered. *Liddy* is ſomewhat different. It is not ſo doubtful of what ſex this ſlave was. But this leſs degree of doubt ariſes not, as it ought to do, from the record, but from our knowledge, that there is no name ſo like *Liddy*, as *Lydia*, which is a woman's name.

As to the law of 1782, it is certain, that the legiſlature is not more the ſovereign than the executive is.—The legiſlature is the people acting under a limitation, and can enact no law contrary to the conſtitution. The courts will be vigilant over the laws; for on the pure adminiſtration of juſtice, according to the ſpirit of the conſtitution, our liberty and ſafety depend.

Can the legiſlature, by a law, declare a free perſon to be a ſlave, when the conſtitution, under whoſe authority

1796. they act, declares all men free, and freedom to be an unalienable right? If they can make one free-man a ſlave, why not a whole county? It is no anſwer to this that he was a ſlave, and, by an omiſſion, became free; nor that he is black. All are alike in the ſight of God. If he has reaſon, he is anſwerable for his conduct. No legiſlature has ſuch a power over whitemen; and none, therefore has ſuch power over black.

But it is objected, that it is doubtful, whether theſe counties were under the juriſdiction of *Pennſylvania*.—It turned out that they were. This was aſcertained before *November*, 1780. This was one of the grievances to be remedied. But there was no power in the legiſlature, to give the remedy attempted. As well might they have made a law to introduce, as ſlaves, after the peace, ſlaves of *Pennſylvanians*, abſent with their maſters in the army. *Samuel Blackmore* could have been in no uncertainty. He was not here. He was in *Maryland*, and had no ſlaves here to regiſter on the 23d *September*, 1780, or the 1ſt *November*, 1780. It was not on ſuch, that the law of 1782 was to operate; but on ſuch as, on the 23d *September*, 1780, were inhabitants of the diſputed territory. On the 23d *September*, 1780, the diſpute ceaſed, and it was no longer doubtful, whether *Pennſylvania* or *Virginia* had juriſdiction; but certain, that the laws of *Pennſylvania* were to govern every man here. The law of 1782 was not then made; *Samuel Blackmore* was not then here; and, coming in afterwards, he brought in his *Negroes* under the operation of the law of 1780; by that law, they became free immediately after their arrival here; and being once free, they muſt ſo remain.

Having land here does not make an inhabitant. Inhabitants of *Europe* have land here. Intention does not make fact. Intending to be a reſident is not being a reſident.

I hope the court will conſtrue theſe acts liberally in favour of liberty, and ſtrictly againſt the owner, who does not purſue the injunctions of the law. As the claim of ſlavery is ſo contradictory to the principles of reaſon and nature, I hope the court will go as far as poſſible, to reconcile them, and ſay, there ſhall be no ſlavery, but where every particular of the law is complied with.

If this were the case of white women, the construction would be liberal. It must be so, in the case of black women. There case is worse than that of criminals.— They, confined for a few years, have the prospect of liberty at last. These never. Were an *American* prisoner in *Algiers*, claiming the benefit of a law there, which declared free all slaves not specially registered, to be told, that such law was a mere formality, what should we think of that country? Should it be told in *Algiers*, that we have a constitution, which declares all men free, and a law to register the name and sex of every slave; they would ask, "Why complain of us? If by that law, free men are declared slaves, why do you boast of a constitution?" 1796.

I argue this case without any recompence, but that which every man finds, in the satisfaction of doing a good action. And I am confident, that this court will take hold of the least flaw, to restore these women to the unalienable rights of nature.

Brackenridge, in reply. On principles of nature, there can be no slavery. But we live under an express constitution; and on constitutional principles, there can be no slave, for the constitution declares all men born free; and the question is, Are these of the human species?— Another section protects property: this was a species of property; and the protection of the constitution is claimed for it.

Such construction will be given, as to render the whole consistent; and the construction will be *secundum subjectam materiam*. These sections relate only to the parties to the contract. These *Negroes* were not parties to it; they were none of the people. If it apply to all men, and a *Negro* be a man, there is an end of the question. If *Negroes* be property, this can only be taken away by consent of the owner.

The compact between the states of *Pennsylvania* and *Virginia* was *in fieri*, till 1784; and the act of 1782 was made, not to *correct*, but to *prevent*, a grievance. The resolution for accepting the cession was not a law; for the stile of laws is, Be it enacted, &c. 2 St. L. 207.

To give perfect relief, the act of 1782 ought to be construed as applying to the inhabitants *at the date of the act*; because the boundary was not then run, nor the cession complete.

1796. As to reſidence, he had bought land, with intention to remove, and reſide on it; he had ſent out an agent, apple-trees, &c. He was no longer an inhabitant of *Maryland.*

Next day, the judges delivered their opinion, that the *Negroes* were free.

SOMERSET COUNTY.

December Term, 1795.

Pennsylvania *v.* Adam Keffer.

1795. THIS was an indictment againſt one of the grand jurors (on the preſentment of the reſt) for that he, being ſworn, &c. "not regarding his oath, nor the good of the county, and the office of a juror, but holding the ſame in contempt, on 22d *December*, 1795, during the ſitting of the grand-jury, on buſineſs given them in charge, did miſbehave himſelf in the office of a juror, and abuſe the truſt put in him, by intoxicating himſelf with ſtrong liquor, and diſqualifying himſelf for the diſcharge of the office of a juror."

The foreman and others of the grand-jury proved the intoxication in a very high degree, during the ſitting of the grand-jury. He ſlept by the fire, and could not be rouſed to do his duty, or anſwer queſtions.

President. If the incapacity aroſe from natural infirmity, or unavoidable accident, you ought to acquit. But, if it was voluntary, you ought to convict. The intention with which the intoxication was produced, whether with a direct view to diſqualify, or not, is not eſſential to the conviction. For it was his duty, not only not to diſqualify himſelf, but to take reaſonable care to preſerve himſelf in a ſtate fit for doing his duty.

WASHINGTON COUNTY,

April Term, 1796.

THOMAS SMITH *v.* WILLIAM FREEL.

ON an appeal from the judgment of a juſtice of the peace, the plaintiff declared in *aſſumſit*, on a promiſſory note, dated 16th *April*, 1782, for the payment of 2*l.* 19*s.* 6*d.* The defendant pleaded the ſtatute of limitations. 1796.

The ſubſcribing witneſs was not to be found; and proof was made, that *Freel*, ſince the ſuit was brought, had admitted, that he had given ſuch a note, but ſaid he had paid it.

PRESIDENT. This is not ſuch a promiſe of a ſubſiſting debt, as will anſwer the plea of the ſtatute of limitations.

The plaintiff ſuffered a nonſuit.

ALLEGHENY COUNTY,

September Term, 1796.

SAMUEL PURVIANCE *v.* WILLIAM SUTHERLAND.

INDEBITATUS aſſumſit for goods, wares, and merchandizes, delivered to *William Sutherland* and *William M'Donald*, on a promiſe by both, and by each, with an averment, that neither had paid.

Proof was made of the book-entries, and of declarations by *Sutherland* of a partnerſhip between him and *M'Donald*, and that it has been, and is, uſual with traders, to have and give intereſt on book-accounts, after ſix months.

1796. *Woods*, for the defendant, produced a receipt, dated at *Chamberſburgh*, from *Purviance* to *Sutherland*, for ginſeng, at a certain price, or at the *Philadelphia* price, if it was higher. Hence Mr. *Woods* inferred, that there was then no partnerſhip. He produced alſo another receipt to *William Sutherland* and *William M'Donald*, for otter ſkins and caſh.

Roſs, for the plaintiff. We have no notice of the defalcation. The receipt is a private tranſaction. This ſuit is brought on a partnerſhip account.

Rule 21. PRESIDENT. Under our rules of practice, it is the plaintiff's fault if he have not notice of the particular payment or defalcation. If he wanted it, he ought to have demanded a ſpecification. The receipt to *Sutherland alone*, ſeems not ſufficient to contradict the evidence of partnerſhip. But *Sutherland* ought to have credit for it in this caſe; as the ſuit is againſt himſelf, on a promiſe made by himſelf.

If, from the evidence of general cuſtom of trade, you can infer, that, in this caſe, it was the agreement of the parties, that intereſt ſhould be payable, after ſix months; you may find intereſt after that time.

The jury found for the plaintiff with intereſt after ſix months.

Leſſee of STEPHEN BAYARD *v.* CHARLES M'INNES.

EJECTMENT for 209¼ acres of land, on a leaſe dated 2d *January*, 1785.

The plaintiff ſhewed a location No. 1293, dated 3d *April*, 1769, in the name of *Samuel Thomſon*, for 300 acres, in *Turtle* creek bottom, adjoining a claim and improvement of *Eneas M'Kay*, and including his own improvement; a ſurvey of 209¼ acres, made by *William Thomſon*, the deputy ſurveyor, 30th *June*, 1769; and a patent to *Samuel Bayard* and *Elizabeth* his wife, and *Samuel M'Kay*, reciting the location and ſurvey, and a deed from *Samuel Thomſon* to *Eneas M'Kay*, dated 21ſt *May*, 1769.

The defendant produced a location, No. 3400, dated 13th *June*, 1769, in his own name, for 100 acres on *Turtle* creek, between the two creſſings, joining *Angus M'Kay* on the eaſt, including his improvement; a ſurvey of 116 acres, and 90 perches, made by *John Henderſon*, then deputy ſurveyor, 10th *December*, 1784; and a patent, dated 19th *April*, 1786. 1796.

Brackenridge, for the defendant, then read a written copy of an act of aſſembly paſſed 3d *February*, 1768, and of a proclamation by the governor, dated 24th *February*, 1768, reciting this act of aſſembly; both directing the removal of perſons ſettled on lands not purchaſed from the *Indians*, but providing that this ſhould not extend to ſettlers under the approbation or permiſſion of the commanding officers to the weſtward.

He then propoſed to produce a witneſs to prove that *Charles M'Innes* had the approbation and permiſſion of the officer commanding at *Fort-Pitt*, to ſettle on the main roads or communications leading through this province to *Fort-Pitt*; and that, in conſequence of this approbation and permiſſion, *Charles M'Innes* ſettled on the land in queſtion, which was on a main road and communication.

Roſs, for the plaintiff, objected to any parole teſtimony; 1. Becauſe ſuch permiſſions muſt have been given in writing; 2. Becauſe *Charles M'Innes's* application does not recite it; and 3. Becauſe, where there was no *written* permiſſion, the commiſſioners of property could not take notice of it.

Brackenridge. It is not required, either by the law or the proclamation, that the permiſſion or approbation ſhould be written. 2. It is not neceſſary, that a ſettler with permiſſion ſhould recite his permiſſion in his location. The adverſe applicant ought to have known, whether or not there was a ſettler with permiſſion on the ground for which he applied. It was not to be ſuppoſed, that the applicant was to make his application or location at random, or on a map; but to take care that his application was for ground unclaimed under any authority.

Woods, for the plaintiff. The preamble to the opening of the Land-Office, 3d *April*, 1769, gives a preference

1796. to thoſe who had ſettled plantations, eſpecially thoſe who had ſettled by permiſſion of the commanding officers to the weſtward.* But, notwithſtanding the permiſſion, if an improvement was not made till after the purchaſe from the *Indians* at *Fort-Stanwix*, no preference was to be given. But the preference was given only to thoſe who applied on 3d *April*, 1769. For, if the perſon *permitted*, and to be preferred, did not apply on that day, he loſt his preference. It was preſumed, that, unleſs he applied then, he waved his preference. The proprietaries were then at liberty to grant the land to any other, and were not to keep up a preference to the ſettler any longer: for if they muſt keep it up for a day, they might be obliged to keep it up thirty years.

* See Appendix.

Brackenridge. The word *approbation* implies, that there was no neceſſity for a written permiſſion. Settlement with the knowledge is evidence of the *approbation*, of the commanding officer; and not being turned off, is permiſſion. It behoved the applicant to apply only for land to which none other had a better claim. All applicants were ſuppoſed to know the ground, and they deceived the proprietor, if they made not a juſt repreſentation.

The objection of the loſs of preference, unleſs application was made on 3d *April*, 1769, is the only formidable objection. From 1736, in conſequence of the minority of the proprietors, legal titles could not be granted; and, on application to Mr. *Logan*, the agent, he permitted ſettlements, and gave a promiſe of titles, when the proprietors ſhould be of age. After the proprietors were of age, in conſequence of lord *Baltimore's* claim to the ſouthern border of *Pennſylvania*, *permits* were given to ſettle, and ſupport the juriſdiction. This was an origin of a cuſtom, that ſettlers had an equitable right, and the proprietors were bound to give them a title; and courts of juſtice invariably determined ſo, and directed in favour of improvers. Under this idea, people came over the mountains. The act of aſſembly, which I have read, ſanctioned this before the purchaſe only if it was by permiſſion. The proclamation of the governor, alſo a proprietor, is to the ſame effect. The preamble to the opening of the Land-Office reſpected only the locations put into the box or trunk; and took

not away any right veſted in thoſe who had ſettled by permiſſion. The preamble regulated only the preference between locations then put in, and took not away the right under the uſage of *Pennſylvania*. It could not have been its intention to take away this right. The people of this country had no notice. There was but one gazette in *Philadelphia*. There was no poſt, nor advertiſement. The ſettler depended not on the acts of the government, but on the ſtrokes of his axe on the ground; and thought the man muſt be a robber, who would take away his land, from which all, but he who had *permiſſion*, were baniſhed by a law and a proclamation. 1796.

PRESIDENT. It may, on the whole be beſt, to receive the teſtimony: but we will reſerve the point; that, if there ſhould be a verdict for the defendant, there may be a motion for a new trial.

Evidence was then given, that *M'Innes*, in 1768, aſked captain *Edmonſtone*, the commanding officer at *Fort-Pitt*, for a permiſſion for a piece of land. *Edmonſtone* ſaid he could give no permiſſion to ſettle but on the road, and deſired him to go and find a piece of land on the road, and come to him, and he would give him a permiſſion. Immediately after this, *M'Innes* ſent a man to this place, who grubbed, a week, and made four or five hundred rails, in the bottom between the two fordings of the creek, where he has his houſe and clearing now. And in *March*, 1769, he built a cabbin there, twenty-five feet ſquare, and covered it. *M'Kay* knew of *M'Innes* working there, and gave directions, that he ſhould not be permitted to clear over his marked line, which he pointed out. *M'Innes* then lived at ſome diſtance, and ſettled another plantation, which he afterwards ſold. In 1770, or 1771, there was corn raiſed at *M'Innes's* improvement on *Turtle* creek; but he did not live there till 1782, or 1783.

The plaintiff then produced evidence, that the preſent deputy ſurveyor had traced the lines of the patent, and found correſponding line and corner marks on the trees; and that the ſurvey of *M'Innes* interfered with thoſe lines. Evidence was then given, that *M'Kay* had taken out the location in the name of *Samuel Thomſon*, and had paid

1796. for the ſurvey; that the conveyance from *Thomſon* was not to be found; that *M'Kay* had forbidden *M'Innes* to work on this land; that *M'Innes* had agreed to forbear, if *M'Kay* would give him 4*l.* to pay for the ſurveying of another tract; that *M'Kay* and *M'Innes* agreed to ſubmit it to three men to value *M'Innes's* improvement; and that they valued it, (being, as appeared from a writing produced by the plaintiff, dated 15 *November*, 1770, ſigned by them, a cabbin, without roof or door, with a few rails deadened) at 45*s.*

PRESIDENT. The title is clearly in the plaintiff; unleſs it has been diveſted by ſome act of *M'Kay's*.—You will enquire, 1. Whether there was any agreed line; and 2. Whether, if there was, *M'Innes* has relinquiſhed his claim under it, by a ſubſequent tranſaction.

Verdict for the plaintiff.

2 *St.* 1080. 3 *Bla. Comm.* 358, 399. 2 *St. L.* 268. NOTE. In this caſe, a ſpecial jury had been ordered; (at a term in which the cauſe was not tried) and Mr. *Brackenridge* moved that the coſts be paid by the plaintiff, on whoſe motion it was ordered.

3 *St. L.* 782. PRESIDENT. The coſts ought to be paid by the party putting off, or loſing the cauſe. The bill of fees directs this.

Leſſee of the Executors of WILLIAM THOMSON *v.* DAVID GILLILAND.

IN ejectment for land in *Pitt* townſhip, the plaintiff produced a location, No. 3201, dated 9th *May*, 1769, in name of *Robert Mitchel*, for three hundred acres, adjoining *John Donne*, on the road from the *Bullock-Pens*, to *Braddock's-Fields*; and ſhowed alſo the location in the name of *John Dunn*, No. 3115, dated 20th *April*, 1769, for three hundred acres, at a place commonly called the *Bullock-pens*, at the *Nine-mile* run, on general *Braddock's* road, adjoining lands claimed by *John Frazer*, *Peter Rolleter*, *Conrod Winemiller*, and *William Elliot*.

He then propoſed to give in evidence a draught of a ſurvey, without ſpecification of date or quantity, but ſtating the out lines, courſes and diſtances, corner trees,

and adjoining claimants, with the following writing on the face of it: "*Robert Mitchel*, now *William Thomſon*," and underneath, "Good land, bought of Mr. *Joe Spear*, at 300*l.*" and, together with this, the copy of the location, put into the hands of *William Thomſon*, (the deputy ſurveyor) for ſurveying, indorſed in *Thomſon's* hand writing, "*Robert Mitchel*, No. 3201, executed." 1796.

Brackenridge, for the defendant, objected to this evidence. 1. Becauſe this draught is in the hand writing of the teſtator of the plaintiff, made by the perſon intereſted, whoſe act, in his own behalf, has no validity, until recogniſed by the ſurveyor general.

2. Becauſe this paper is not certified to have been a ſurvey made by *William Thomſon*, the deputy ſurveyor, nor by any one for him, or under his authority or direction; nor indeed ever made. It appears only a diagram.

Woods and *Young*, for the plantiff. 1. None but *William Thomſon* could have made the ſurvey. We will prove when it was made; and that it was before *William Thomſon* was intereſted. Surveyors have always executed ſurveys of their own land.

2. It was determined at *Niſi prius* in *Huntington* county, that a diagram, made by the ſurveyor, the field notes of the ſurveyor, and the tracing of the lines on the ground, and finding them to correſpond with thoſe deſcribed on the draught, was ſufficient evidence of the ſurvey. We will prove, that theſe lines have been traced on the ground, and correſpond. It is immaterial whether the ſurvey was returned or not: It is enough, if we prove, that it was made. *Leſſee of Johnſon v. Cor, Shippen and Yeates J.*

PRESIDENT. The teſtimony is admiſſible, as part evidence of a ſurvey.

Evidence was then given, that in 1769, the witneſs had a ſurvey to make adjoining this, was told by *William Thomſon*, that he had made this ſurvey for *Robert Mitchel*, and ſaw the freſh marks of the line of this ſurvey next his land, and they correſponded with the line on the draught ſhewn; that the lines round *Mitchel's* ſurvey had been lately retraced, that the marks appeared old, and all made at one time, and the lines exactly correſponding with thoſe on the draught ſhewn; and that they comprehended the greater part of a field of *Gilliland's*.

1796. The plaintiff then produced a conveyance, dated 4th *April*, 1770, from *Robert Mitchel* of *Cumberland* county, to *William Thomſon* and *Alexander Roſs*, of the land claimed under the location, acknowledged 6th *Auguſt*, 1770, and recorded 1ſt *September*, 1794.

Evidence was then given, that one *Winemiller* lived on this land, declaring, that he had purchaſed it from *Roſs* and *Thomſon*, before the war with *Britain*.

A conveyance, dated 6 *October*, 1793, from *Winemiller* to *Joſeph Spear*, for this land, was then produced; and alſo a conveyance from *Spear* to *William Thomſon*, dated 1ſt *June*, 1781.

The defendant then produced a copy of the ſame location to *Robert Mitchel*; a conveyance, dated 9th *September*, 1772, from *Robert Mitchel*, corporal in the 18th regiment, to *Jacob Bouſman*, of three hundred acres of land, adjoining a tract of land belonging to , on the road from *Bullock-pens* to *Braddock's-field*; an aſſignment, dated 9th *October*, 1772, by *Jacob Bouſman* to *Jacob Miller*; and a conveyance, dated 23d *February*, 1792, from *Jacob Miller* to *David Gilliland*. Proof was made of the hand writing of *Robert Mitchel*, corporal in the 18th regiment, to the conveyance to *Bouſman*; and it was alſo proved, that the name, *Robert Mitchel*, ſigned to the conveyance to *Thomſon* and *Roſs*, was not in the hand writing of *Robert Mitchel*, corporal in the 18th regiment.

Brackenridge then brought forward a witneſs, to prove that *Robert Mitchel*, corporal in the 18th regiment, had declared, that he had taken out the location.

Woods objected, that this would be admitting a man to make a title by his own declaration. If *Robert Mitchel* were preſent now, he could not be admitted as a witneſs; ſhall then his declarations be admitted?

Brackenridge. Though *Mitchel* could not *now* be admitted to prove, that he had then taken out the location, it may now be proved, that he *then* declared, that he had taken out the location.

PRESIDENT. Surely no man can be admitted to eſtabliſh a title by his own declarations. But declarations of intereſt at the time may perhaps be admiſſible, to ſhew that this perſon was the perſon named in the location. We will admit the teſtimony; but reſerve the

point, as ſuch evidence, if proper, is precarious, and not ſtrongly to be relied on. 1796.

A bill of exceptions was propoſed; and it was agreed, that it might be drawn up afterwards.

The witneſs then proved, that after *William Thomſon* brought up the locations, *Robert Mitchel*, corporal in the 18th regiment, two ſerjeants, and *John Dunn*, a clerk to *Alexander Roſs*, all then in the garriſon, told him, they had each of them got a location for land in this country, and were going out to have it ſurveyed. *Robert Mitchel* ſaid, his location was either for or near the *French Bullock-pens*, near to *William Elliot's*. When *Mitchel* was going to leave the garriſon, there were hot words between him and *Roſs*; and *Mitchel* told the witneſs, that *Roſs* wanted to have the location from him, but *he damned himſelf, if he ſhould have it*, and ſaid he would convey it to another. *Roſs* had made uſe of the names of ſeveral ſoldiers, in taking out locations.

The defendant then produced teſtimony, that, about the year 1772, *Jacob Miller* came into this country, and bought a tract of land from *Jacob Bouſman*; and ſome months afterwards, ſent out one *Bougher* to improve on it. *Bougher* lived on it with his family.—There was alſo proof, that, when *Thomſon* ſurveyed the land, there was a cabbin on it raiſed to the joiſts; and proof, that *Bougher* ſettled within what is now the claim of *Gilliland*.

A ſurvey, made 22d *Auguſt*, 1790, by the ſurveyor of the diſtrict, on *Mitchel's* location, was ſhewn, containing two hundred and ſixty-two 1-quarter acres.

Young. *Mitchel* was but a truſtee, and had but the mere legal or nominal right. 3 *Atk.* 96.

Brackenridge. The preſumption is, that *Robert Mitchel* took out the location, and had the intereſt in it.—The contrary muſt be proved. *Thomſon* abandoned his ſurvey, never returned it. The law has guarded againſt ſecret conveyances? Why not againſt ſecret ſurveys? No uſe was ever meant to be made of this ſurvey. Shall we bring forward notes found in a deſk? Finding no return of a ſurvey, the improver had reaſon to preſume, that the location (which coſt but a dollar) with the ſurvey on it, was abandoned; and had good heart to go on, and make further improvements.

1796. *Woods.* There was no improvement, at the time of the ſurvey, to defeat the legal title. *Mitchel's* declaration is no evidence, that the location was his. It only proves, that, when he heard, there was a location in his name, he was determined to claim the land.

PRESIDENT. If the ſurvey was compleatly made in 1769, as it appears to have been, there was then no improvement or ſettlement, that ought to have been regarded, and the title is in the perſon who has the intereſt in the location.

The intereſt was in the perſon who procured, and paid for the location.

If *Robert Mitchel*, corporal in the 18th regiment, was the perſon who procured the location, and paid for it, the intereſt was in him. If the location was taken out by another, in the name of *Robert Mitchel*; *Mitchel* was but a truſtee, without intereſt.

You will therefore enquire, 1. Whether *Robert Mitchel*, named in the location, had an intereſt, or only a bare truſt. 2. Whether *Robert Mitchel* named in the location, was *Robert Mitchel*, corporal in the 18th regiment. 3. If he was, and was but a truſtee, whether his title has come into the hands of *Gilliland*, *bona fide*, without notice of the truſt, and for an adequate conſideration: for if ſo, *Gilliland* has the eſtate clear of the truſt. For I cannot ſee any good reaſon for diſtinguiſhing this from the ordinary caſe of a truſt, or for permitting owners of locations to run no riſk, while in uſing the names of others, they give them an opportunity of impoſing on innocent purchaſers.

The jury came to the bar, ready to give a verdict; and the plaintiffs ſuffered a nonſuit.

NOTE.—See the caſe of a bill of exchange payable to a *fictitious* payee, a perſon not in exiſtence, &c. 3 *T. Rep.* 174, 182, 481.—1 *H. Bla.* 313, 569.

HUGH MULHOLM *v.* JOHN CHENEY.

1796.

IN *September*, 1793, on a warrant from a juſtice of the peace, on a judgment againſt one *Wright*, the conſtable had a horſe delivered to him in execution by *Wright*. *Cheney* becoming ſecurity for the ſafe keeping and delivery of the horſe, the conſtable left him in poſſeſſion of *Wright*, till he ſhould be demanded for ſale, which, it was expected would be in about three weeks. In the mean time, *Wright* paying part of the debt, the plaintiff ſtayed the ſale; and *Wright*, in the preſence of *Cheney*, who made no objection, delivered the ſame horſe, then in the incloſure of *Cheney*, who lived on *Wright's* plantation, to *Mulholm*, to indemnify him againſt a debt for which he was ſecurity for *Wright*. In the end of *February*, 1794, the conſtable, being directed by the juſtice to make ſale, called on *Wright* for the horſe, who did not deliver him, but pretended he had paid the debt. At the *March* court in *Pittſburgh*, the conſtable called on *Cheney* for the horſe. *Cheney* pointed out the horſe as a boy was leading him to water; and took him by the halter, and delivered him to the conſtable.

Mulholm brought replevin for the horſe. And now a motion was made to quaſh this replevin, on the ground, that it was brought for property taken in execution.

Brackenridge, for the motion. Replevin, at common law, lay only for goods taken by way of diſtreſs for rent. It certainly lies not for goods taken in execution; for that would render the proceſs of law void; and there would be, in the language of *Hudibras*, "No end to th' everlaſting ſuit." Even in the caſe of a third perſon's goods, taken in execution, in order to prevent colluſion to defeat executions, treſpaſs, and not replevin, muſt be brought.

Our proceedings in replevin, are founded on our act of aſſembly. 1 *St. L.* 59. *Dall.* 156.

An act of aſſembly has declared all writs of replevin iſſued for any owner of goods taken in execution, or by diſtreſs, by any ſheriff, county lieutenant, conſtable, or collector of public taxes, to be irregular, erroneous, and void; and has directed that it ſhall be quaſhed; and that the court ſhall award treble coſts to the defendant, and may 1 *St. L.* 795.

1796. order an attachment againſt the clerk who knowingly made out the writ. This muſt extend to third perſons, for, as to parties to the execution, the law was unneceſſary, for the common law made ſuch replevin irregular. This act muſt mean ſomething more. It appears from the journals of the aſſembly, that it was the intention of the legiſlature to prevent replevins by third perſons, for goods taken in execution. For, when the firſt ſection was under conſideration; a motion was made to reſtrain the prohibition to parties to the execution, by adding, after the words "owner of goods taken in execution or by diſtreſs," the following words, "*being the defendant in the action, or perſon incurring the fine.*" This motion was negatived; and againſt this negative, there was a ſolemn proteſt, "that it left officers at full liberty, under the pretence of executing the laws, greatly to oppreſs the people; left their property very inſecure; and was highly dangerous to their rights and liberties."

Journ. 27th March, 1779.

It is better, if property of a third perſon be found in the poſſeſſion of the perſon againſt whom the execution is, that he who gave the truſt ſuffer, than that, by colluſion, the proceſs of law be defeated.

Roſs, for the plaintiff. I will not contend, that, if the property of a third perſon were taken in execution by a ſheriff or conſtable, the owner could bring a replevin againſt the ſheriff or conſtable, while the property was in the poſſeſſion of the officer, but that he could againſt the vendee of the officer.

The affidavits ſhew, that this horſe is not to be conſidered as a horſe taken in execution; but as taken by a private individual, from a *bona fide* transferree and poſſeſſor. The execution was againſt *Wright*. The horſe was left in the cuſtody of *Wright*. *Cheney* was ſecurity to the conſtable, that *Wright* would deliver the horſe to him. The lien of the execution on the horſe was then diſſolved; and the conſtable could look only to the ſecurity. The ſale of the horſe to *Mulholm*, by *Wright*, in the preſence of *Cheney*, is to be conſidered as the ſale of the conſtable; for it is the ſale of his bailee. This is not a horſe taken in execution; the lien was gone. It would be diſhoneſt, to ſuffer an innocent purchaſer to be defrauded. The return day of the execution was paſt. *Cheney* was no conſtable, and did not take the horſe as

1 *Wils.* 44. 2 *T. Rep.* 596.

a conſtable. It is not againſt a conſtable that the ſuit is brought. This is a proceeding for a penalty of treble coſts. 1796.

The court took time to conſider, and next term delivered their opinion.

PRESIDENT. Were the act, declaring replevins void, to be underſtood as reſtraining only third perſons, whoſe goods were found in the poſſeſſion of him againſt whom the execution was, it would be leſs exceptionable. But it is contended, that it extends to all owners: and this, ſurely *may* deprive an innocent owner of a ſpecific, ſummary remedy, for a wanton act of oppreſſion by an officer, the more odious, as it is under the colour of public authority; though he would have this remedy againſt any other but an officer. 1 *S. L.* 795.

It may, indeed, be ſaid, that, in order to prevent colluſion with debtors, by fraudulent transfers, there may be reaſons of policy for refuſing to extend to the caſe of goods taken into the cuſtody of the law by execution, &c. a remedy, which ſeems originally to have been confined to the ſingle caſe of diſtreſs for rent, and, confiding in the virtue of officers, rather than of individuals, for leaving any tranſgreſſion to the ordinary remedy of an action of treſpaſs. And, indeed, from the defendant in replevin's power, by ſetting up a claim of property, to retain the goods, an action of replevin may be a not more ſpecific remedy, than an action of treſpaſs.

But, notwithſtanding, as no value may compenſate the *pretium affectionis* of the thing taken; as a warrant to take the goods of *A.* will not juſtify taking the goods of *B.*; and an officer acting without authority is but an individual; as we ought not to ſuppoſe, that the legiſlature intended to countenance treſpaſſes; and it is the duty of courts to extend remedies; I have a ſtrong reluctance againſt adopting the conſtruction contended for of this act, as a general prohibition, and I would not admit this conſtruction, if I could exclude it.

The law of *England* ſtates *generally*, that replevin does not lie for goods taken in execution; yet (except for a reaſon which is given for it, that goods are only repleviſable, when taken by way of diſtreſs, and which does not apply here, where replevin lies for any claim of goods), I do not know, that this is not underſtood 2 *Str.* 1184. 5 *Com. Dig.* 436. *Bul. Ni. Pri.* 53. *Dall.* 157.

1796. only of a replevin brought by him againſt whom the execution is; for that is the caſe of the only replevin of
1 *Str.* 567. this kind, that I have obſerved, where this can be aſcertained.

If it be the meaning of the law of *England*, that replevin for goods taken in execution is only prohibited, when brought by him againſt whom the execution is, ſuch may alſo be the meaning of the act of aſſembly.—Acts are ſometimes made in affirmance of the common law.* And I am informed, that, at the paſſing of this act, there was occaſion for ſuch an explicit declaration, by act of aſſembly; for, at that time, many actions of replevin had been brought by perſons, whoſe goods were
Journ. Aſſem. 17th February 1, 27, 31, March, 1779. taken for taxes and militia fines. This law was made on the ſpur of the occaſion, and in the fervor of a revolution. The aſſembly might have been unwilling to admit any amendment, which might ſuggeſt an evaſion of payment of a public tax; and may have determined, making the words as general as the expreſſions in the *Engliſh* books, to leave their conſtruction, as in *England*, to the courts. A law ſo made, and reſtraining a remedy, will be narrowed as much as poſſible in the conſtruction.

If the ſheriff or officer be doubtful, as to the property; he may call on the plaintiff to ſhew him property, and indemnify him; or he may hold an inqueſt, to find whether it be the property of the defendant, or not.

But it is not neceſſary to give any opinion on this point: for we are of opinion, that this is not the caſe of goods taken in execution; and therefore, that the plaintiff take nothing by his motion. The horſe was not taken out of the hands of the conſtable. The conſtable delivered him to the owner, and having thus enabled him to impoſe on others, he muſt look to him or his ſecurity.

* It has been ſaid, that even an act of parliament to make a man judge in his own cauſe would be void. *Hob.* 87. There was therefore no occaſion for an act of aſſembly forbidding any member of a court of juſtice to ſit in judgment while his own cauſe is upon trial. Yet ſuch an act there is, 1 *St. L.* 33.

WESTMORELAND COUNTY.

September Term, 1796.

Leſſee of JOHN GALBRAITH *v.* JOHN M'GAW.

THIS was an ejectment for 300 acres of land, on *Campbell's* run, *Donegal* townſhip. 1796.

The plaintiff ſhewed a location No. 3048, dated 13th *April*, 1769, in the name of *Michael Coffman*, for three hundred acres on the ſouth branch of the *Four Mile* run, bounded, on the ſouth, by the claim of *Philemon Aſkins*; on the eaſt, by the claim of *Thomas Pitton*; and, on the north, by the claim of *Thomas Campbell*.

He then ſhewed an order, by *John Boyd*, (a deputy ſurvevor under *William Thomſon*, ſurveyor of the diſtrict) on *Michael Coffman*, for 3*l.* 5*s. remainder of ſurveying fees.*

Woods, for the plaintiff, then ſuggeſting, that the firſt ſurvey, made by *John Boyd*, had not been returned, ſhewed a draught and certificate of a ſurvey of three hundred acres and the allowance, made 11th *February*, 1795, by *Benjamin Lodge*, then ſurveyor of the diſtrict, in purſuance of an application, No. 3048, dated 13th *April*, 1769, with a note annexed, that this ſurvey is ſubject to a claim of *John M'Gaw*, on a late warrant, but the lines of it appear to have been run twenty odd years ago.

He then ſhewed a conveyance of this location and land from *Michael Coffman* to *William Campbell*, dated 11th *June*, 1790, reciting a previous conveyance, dated 8th *April*, 1775, and (becauſe it did not recite the location) confirming that conveyance. He alſo ſhewed a conveyance by *James Guthrie*, ſheriff of *Wetsmoreland* county, to *William Parks*, reciting a judgment againſt *Thomas Campbell* and *Michael Coffman*, of *October* term, 1773, a *fieri facias* teſted of that term, a levy on a tract of land "on which defendant lives, with a ſmall improvement ſubject to incumbrances;" and a judgment againſt *William Campbell*, 6th *October*, 1791, a *fieri facias*, 23d *March*, 1792, a levy of "three hundred acres

1796. of land, more or leſs, joining lands of *John M'Gaw*, *Nicholas Wilſon*, and others; *venditioni exponas*, on both judgments, and ſale, 14th *September*, 1792, of that tract of land of three hundred acres, more or leſs, joining *John M'Gaw*, *Nicholas Wilſon*, and others, to *William Parks*, to whom the conveyance thereupon is. And he ſhewed a conveyance of the ſame land by *William Parks*, *to John Galbraith*, dated 18th *February*, 1794, and reciting the ſheriff's deed.

The aſſiſtant who made the ſurvey under *Benjamin Lodge*, on 11th *February*, 1795, proved, that he found old lines round this ſurvey, except as to part, where he threw out land, as the old lines contained more than the lines of this ſurvey; that he threw out part of that which *John M'Gaw* claims, and a greater part at the oppoſite end of the ſurvey; and that *John M'Gaw* has land out of this ſurvey, beſides what he claims within it.

Brackenridge, for the defendant, produced a warrant to *John M'Gaw*, dated 29th *December*, 1785, for two hundred acres including an improvement, joining lands of *James Campbell* on the north eaſt, *William Campbell*, and *Nicholas Wilſon*, intereſt commencing from *March*, 1779; and a ſurvey of two hundred and twenty-five acres and twenty-two perches, made on this warrant, 27th *June*, 1786.

Evidence, was then given, that, in 1769, there was a *deadening* on *Coffman's* land; that, in 1770, his houſe was raiſed; that, in the fall of 1769 or 1770, *John Boyd* made *Coffman's* ſurvey, conducted by *Thomas Campbell*, who ſaid he had taken in the cream of the land; that one of the lines made by *Boyd* is now *M'Gaw's* line, is near a ſpring, which it leaves out of *Coffman's* ſurvey, and is near where *Coffman's* houſe was afterwards built, and goes through a field; and that *Coffman* ſhewed this as his line, in 1772, to one who propoſed to buy from him, and gave as a reaſon why it went through the field, that he was abſent, when the field was cleared, and the grubber went over the line; and ſaid it was *Thomas Campbell's doings* to build the houſe ſo near the line.

Evidence was alſo given, that, in *February*, 1771, *John Overun* ſettled where *John M'Gaw* now lives, built a cabbin, cleared two or three acres and put it in corn, and lived there till *April*, 1772. His brother-

in-law took poſſeſſion of it under him; and lived there till *Overun* ſold it, in 1773, to *John Livingston*, who, the ſame year, ſold it to *Hugh Lorimer*, who, on 13th *Auguſt*, 1780, aſſigned his conveyance of it to *John M'Gaw*. There had been a conveyance from *Overun* to *Livingston*, and it was given to *M'Gaw*, but was ſince loſt. The conveyance from *Livingston* to *Lorimer* was dated 9th *November*, 1773, and ſtated a purchaſe and bill of ſale from *Overun* of 6th *March*, 1773. *Lorimer* ſettled on the land the ſpring of 1774, and lived there, except when driven off by the *Indians*. In 1786 or 1787, one *Rankin* an aſſiſtant ſurveyor came to make a ſurvey for *Thomas Campbell*, on *Coffman's* location, began at *Boyd's* corner, and went round till he came to *M'Gaw's* line, but would not croſs it; and *Campbell* directed him to enlarge the ſurvey towards *Philemon Aſkin's* claim. Evidence was alſo given, that, in 1772, *Coffman* and *Overun* agreed, that the line between them ſhould be two rods beyond the ſpring, ſo that *Coffman* ſhould have it: another witneſs ſaid, that *Coffman* was to have a way to the ſpring. 1796.

There was alſo ſhewn by the defendant, a written agreement, under ſeal, by *Michael Coffman* and *Thomas Campbell*, dated 8th *April*, 1775, to ſell to *William Campbell*, a tract of land for which he was to take out a warrant. This, the defendant's counſel ſuggeſted was the deed referred to by the conveyance from *Coffman* to *Campbell*, dated 11th *June*, 1790. And one witneſs ſwore that *Coffman* ſaid, his located lay over between the diſputed land and the *Four-mile* run.

Michael Coffman was called, and ſwore, that, in 1768, he employed a man to make an improvement for him; that he cut a clapboard tree, raiſed two logs high of a cabbin; that he went out next ſpring, hired two men, and worked on the land, ſettled there near the ſpring, applied for a location, claimed the land in diſpute, cleared on it, and made no lines with *Overun*; that *Boyd* did run the line between his houſe and the ſpring, but told him he had not his compliment, and he would come back, and make other lines; that he never came back, but he underſtood one *Hamilton* came, after he had ſold the land to *William Campbell*; that he intended to hold

1796. down to the branch of the run; and that *Thomas Campbell* never had any intereſt in the location.

Brackenridge, for the defendant, then produced a copy of a record of an ejectment to *April* term, 1774, for this land, by the leſſee of *John Livingston* againſt *Thomas Campbell*; which ſtated that, at *January* term, 1775, this diſpute was referred, by conſent of the parties, to five arbitrators, who, 19th *February*, 1776, awarded that *Thomas Campbell* had no right to the land, and that he pay coſts.

Woods, for the plaintiff, objected to this on two grounds. 1. Becauſe no agreement of *Thomas Campbell* ſubſequent to 8th *April*, 1775, could be admitted; for if he ever had any right, he, together with *Michael Coffman*, had, by deed of that date, conveyed this land to *William Campbell*, and afterwards could not affect it by any act of his.—2. Becauſe the judgment againſt *Thomas Campbell*, and the levy of this land on it was prior to the reference or the ejectment.

Brackenridge. No ſubſequent act of *Thomas Campbell* could deprive us of the benefit of any agreement made while he had an intereſt. He was tenant in poſſeſſion; was bound to warrant; and therefore his act is the act of his aſſignee.

PRESIDENT. The act of *Thomas Campbell* cannot affect *Coffman*, nor *William Campbell*, after the ſale to him. A ſubmiſſion is revocable before the award or hearing.

Brackenridge then offered a deciſion of the Board of Property on a *caveat* entered by *William Campbell* againſt *John M'Gaw*, diſmiſſing the *caveat* becauſe a record in ejectment had been produced.

Woods. The court having already rejected the ground of this deciſion, the deciſion itſelf cannot be received.

PRESIDENT. As a deciſion between the parties in this ſuit, on the ſubject now in diſpute, it may be given in evidence. Its operation is another thing.

Brackenridge contended for the line run by *Boyd*, or, at any rate, the agreed line, as the boundary between the parties.

Woods argued, that the line run by *Boyd* was but a line of experiment and never intended to be final, and that the agreed line was incredible.

PRESIDENT. The arbitration or reference and award or report, with the judgment on it, must be laid out of the question, as not binding the present parties. If so, as the decision of the Board of Property states this as its foundation, it cannot, with propriety, be allowed to influence this question. 1796.

The location intitled *Coffman* to three hundred acres, but he might limit himself, if he pleased to one hundred. He did limit himself by *Boyd's* line, which, if acquiesced in, was decisive. He might indeed have called on the public authority to change it; and it would have been changed, if no intermediate legal or equitable claim were affected by the alteration. But, if an intermediate right interfered, the alteration could not affect it.

The only clear evidence of the interference of public authority, to alter the limitation of *Coffman's* claim, is the survey made by *Benjamin Lodge*, 11th *February*, 1795. That indeed refers to *old lines*. How, or when, or why, the old lines were made, it does not appear.

The questions then are, Were those old lines made by authority, were they such as would have been a limitation of *Coffman's* claim, or were they voluntary, and not binding him? If they were voluntary and not binding him, were they an alteration of *Boyd's* authoritative survey? If they were authoritative, did any intermediate legal or equitable right intervene?

Before 11th *February*, 1795, a legal right, *M'Gaw's* warrant and survey, intervened; and no act done by *Galbraith then*, could affect the title acquired by *M'Gaw before*.

The agreed line rests on the credibility of the witnesses; and the truth must be ascertained by you.

The jury found a verdict for the defendant.

FAYETTE COUNTY,

September Term, 1796.

CHARLES LARSH *v.* HANNA LARSH.

1796. THE caſe on a writ of partition was thus :—*Paul Larſh* was ſeized in fee of an eſtate in *Fayette* county. By his firſt wife, he had iſſue *Charles*, the plaintiff. By his ſecond and ſurviving wife, he had iſſue *Hanna*, the defendant. He made his will, on 17th *November*, 1792, deviſing one third of his land to his wife, during her widowhood; one third to his ſon *Charles*, in fee-ſimple; and one third to his daughter *Hannah*, in fee-ſimple; and his wife's third, after her death or marriage, to them alſo in fee-ſimple, to be equally divided between them: provided alſo, that, if he ſhould have more children, they ſhould be equal ſharers, notwithſtanding the former bequeathments. He died 11th *April*, 1793. In *Auguſt*, 1793, *John Larſh*, a poſthumous ſon, was born, who died in *Auguſt*, 1794, during the widow-hood of his mother.

On this caſe, the following queſtions were ſubmitted to the opinion of the preſident.

1. Whether the eſtate deviſed was in joint-tenancy, or in common?

2. If the former, will not the ſhare of *John* be equally divided between *Charles* and *Hannah*, as ſurvivors? If the latter, does not ſuch ſhare veſt excluſively in *Hannah*?

2 *P. Wms.* 741. *Campbell*, for the plaintiff. In a will, where the intention is plain, it will control the legal operation of the words.

Leſſee of Kerlin v. Bull. Dall. 175. *Anon. Dall.* 20. A deviſe of lands to a ſon, when he arrives at the age of twenty-one years, to hold to him, his heirs and aſſigns forever, is a veſted deviſe; and if, after the death of his father, the ſon die under age, inteſtate, unmarried, and without iſſue, his mother ſurviving, the eſtate deviſed ſhall not go to his eldeſt brother, as heir at common law, but be equally diſtributed among his brothers and ſiſters.

1796.

The act of 23d *March*, 1764, directs, that the estate of children dying intestate, in their minority, unmarried and without issue, shall be equally divided among the surviving children. This obviates any objection, derived from *John* the deceased child's being born of a second wife; for it embraces all the surviving children, more especially, when the estate (as in the present case) is derived from one common ancestor. 1 *Dall. St. L. App.* 47.

Young, for the defendant. The posthumous son of the testator in the case stated was particularly provided for in the will; and became entitled to one-third of the land by purchase as devisee. The act of assembly entitles a posthumous child, not provided for by will, to such part of the estate as if the father had died intestate. 1 *Dall. St. L. App.* 48.

John Larsh became seized of an estate of inheritance in the land, subject to the common rules of descent.—*Charles* and *Hannah* are clearly several devisees, and not joint tenants; for no benefit of survivorship is mentioned, and the words "to be equally divided between them," imply a tenancy in common, and relate to the whole estate. Joint tenancy is not favoured in the law: The posthumous son was to take in the same manner; and whatever may be reasonable, or however the testator *may have* intended, his intention can be looked for only in the will. Any intention not found there cannot be presumed. If any such intention could be presumed, it would be in favour of the youngest and most helpless.

If *John Larsh* had a vested estate, subject to the common rules of inheritance, it must go to his sister *Hannah*, as heir at law of the whole blood.

PRESIDENT. On the questions proposed, my opinion is—

1. That either by the will, or by the act of assembly, this was not a joint tenancy.

2. There might have been room to doubt whether the act of assembly was not applicable only to lands derived from an intestate father. However this may have been; since the case of *Kerlin v. Bull*, it appears, that, by the act of assembly, the son *John* having died intestate, in his minority, unmarried and without issue, the estate descending to him from his father is to be equally divided among the surviving children of his father. *Dall.* 175.

WASHINGTON COUNTY,

October Term, 1796.

UNITED STATES v. JACOB WOLF.

1796. *INDEBITATUS assumsit* for 96 dollars and 12 cents, being arrearages of duties on two ſtills owned and uſed for the diſtillation of whiſkey, in the year commencing with the 1ſt *July*, 1793, and ending with the 30th *June*, 1794, and, in conſideration of this, laying a promiſe on 28th *November*, 1794, to pay thoſe arrearages.

1 U.S.L.319 The duty impoſed on ſtills by the act of congreſs was not paid in theſe counties, and the attempts to enforce its payment here, having excited the inſurrection, and been rendered effectual by the expedition of 1794, the ſecretary of the treaſury, on the 17th *November*, 1794, conſidering the hardſhip of enforcing the payment of all the arrears of duty in theſe counties, from 30th *June*, 1791, inſtructed the collectors to receive entries of ſtills, for the year beginning with the 1ſt *July*, 1794, and ending with the 30th *June*, 1795, without exacting the payment of any arrears of duty except for the year immediately preceding, that is, from the 30th *June*, 1793, to 1ſt *July*, 1794, aſcertaining thoſe arrears by the capacity of the ſtills.

2 U S.L. 95. In conſequence of this, the collectors, though the time of entry was paſt, did receive entries of ſtills, and, at the ſame time, took expreſs written promiſes to pay the arrears of the preceding year. And, in conſideration of this entry and promiſe, paſt penalties and forfeitures were waved.

1 U.S.L.321. 2 U.S. L. 98. 3 U.S.L. 90-1.

But, afterwards, ſome diſtillers in *Waſhington* county fancied, and many were told, that, if there was no office of inſpection in that county in the month of *June*, 1793, they were not liable to the duty for the year from 30th *June*, 1793, to 1ſt *July*, 1794; and if they were not liable, their promiſe to pay did not bind them.

2 U.S.L. 95.

Many diſtillers, therefore, who, in *November*, 1794, had entered their ſtills for the current year, and pro-

miſed payment for the preceding, refuſed to comply with this promiſe; and, on this refuſal, ſuits were brought againſt them. 1796.

Among theſe was *Jacob Wolf*; and, at the trial of this action, the preceding circumſtances were proved as to him; and proof was alſo made of the capacity of his ſtills; that they were worked in the ſpring of 1794, and were in the furnace in *Auguſt*, 1794; that there was an inſpection office opened in *Waſhington* county in *June*, 1794, and continued in other counties of this ſurvey; and that a demand of the arrears was made of *Jacob Wolf*. A looſe piece of paper containing various numbers of gallons of whiſkey diſtilled, but without dates, was offered in evidence for the defendant, but rejected, as not being a book within the meaning of the act of congreſs. 1 U.S.L.319. 1 U.S.L.319. 20.

Brackenridge and *Young* for the defendant. There is no evidence of an inſpection office in *Waſhington* county in 1793, therefore no arrears are demandable for the year 1793-4. If there were a promiſe, it is without conſideration, obtained by miſrepreſentation, and by taking undue advantage of the defendant's ſituation.— There was no demand made at the dwelling-houſe of the defendant. No laws paſſed after *May*, 1794, are to be taken into view in this action. No advantage can be taken of the penalty or forfeiture of the law of *June*, 1794, but for the purpoſe of enforcing the payment of duties under exiſting laws. 2 U.S.L.95. 1 U.S.L.319.

Roſs and *Campbell*, for the *United States*. In *November*, 1794, the defendant was liable to all paſt duties, penalties, and forfeitures. If no election be made, the duty is payable on the capacity of the ſtill. The act of 1794, requires an entry of ſtills, if there be an office within the ſurvey; and makes a perſonal demand ſufficient. This applies to all future demands of paſt duties. There is a diſtinction between duties and penalties.— The duties ariſe from working the ſtills, or having them erected in ſtone, brick, or ſome other manner, whereby they ſhall be in a condition to be worked. The duties are a debt, though the ſtills were never entered. The penalties cannot be demanded for not entering, unleſs an office exiſted within the legal bounds; but the duty is notwithſtanding a debt and payable. And, as the de- 3 U.S.L.93-95. 1 U.S.L.319.

1796. fendant has ſhewn no regular book, that debt muſt be aſcertained by the capacity of the ſtill. The diſtillers have been greatly favoured. The duty for three years might have been exacted, and demand is made for the duty of only one of thoſe three years; and all penalties and forfeitures are waved. Surely here is a valuable conſideration for a promiſe.

PRESIDENT. I will conſider this caſe,

1. As if no expreſs promiſe to pay had been made on the 28th *November*, 1794;

2. As on this promiſe.

1. I am clearly of opinion, that, on the 28th *November*, 1794, all duties on ſtills, not paid, were then due, and might be exacted for three years, from the 30th *June*, 1791, to the 1ſt *July*, 1794, whether an inſpection-office exiſted in the county or not. The exiſtence or non-exiſtence of an inſpection office, only comes in queſtion, when the penalty for not entering is demanded. Both penalty and duty may be exacted. The penalty is
3 U.S.L.320. "the more effectually to prevent the evaſion of the duty;" and, therefore, as it may be *leſs* than the duty, cannot be *inſtead* of it. If on a demand, a regular book had been exhibited, the defendant might have elected to pay according to the quantity of the ſpirits diſtilled. But as no book has been ſhewn, the duty, according to the capacity of the ſtills, might be demanded and recovered, whether the defendant promiſed or not; for, if due, the law implies a promiſe. Of this duty a ſufficient demand has been proved; and the defendant muſt pay it.

2. To underſtand the expreſs promiſe, we muſt take into view, the preſident's inſtructions with regard to the country in general, and the inſtructions of the ſecretary of the treaſury to the collectors, and conſider this promiſe as an execution of theſe, on the part of the defendant. It is a reaſonable, and for him an advantageous execution. The *United States* might have exacted from the defendant the penalty for not entering his ſtills in *June*, 1794, and might have exacted all paſt duties, penalties, and forfeitures. Waving theſe is a good conſideration, and the promiſe is binding.

In either way, there muſt be a verdict for the *United States*.

The jury found for the *United States* the ſum demanded.

ALLEGHENY COUNTY,

December Term, 1796.

Pennsylvania *v.* Thomas Lemmon.

1796.

An inquiſition of forcible entry and detainer was removed by *certiorari*, and tried at this term.— The entry was laid on 8th *April*, 1796, into 371½ acres of land in *Pitt* townſhip, in the poſſeſſion of *William Todd*. The land is on the weſt ſide of the *Allegheny* river.

On the 15th *March*, 1793, *William Todd* had, under the law of the 3d of *April*, 1792, obtained a warrant for 300 acres of land; and, on the 15th of *April*, 1796, had a ſurvey of 371½ acres made on it. In *May*, 1793, he had a ſmall cabbin built on it, ten feet long, and eight feet wide, not covered, and without a door; and he deadened about three quarters of an acre. In *October*, 1795, he built another cabbin, about one half or three quarters of a mile from the firſt, fourteen feet long and twelve feet wide, covered with ſlabs, but without a door; and he deadened about half an acre. This was the evidence of poſſeſſion by *William Todd*. In the fall of 1795 or beginning of 1796, *Thomas Lemmon* came on this land, to make a ſettlement for himſelf, in the terms of the act of aſſembly, lived ſome time in the laſt built cabbin of *William Todd*, and, afterwards, built one for himſelf, within *Todd's* line, and about three perches from the laſt mentioned cabbin. 3 *St. L.* 209. 3 *St. L.* 209.

The evidence of the force was that *Lemmon* ſtood in the opening of his ſhed or cabbin, with his gun, and refuſed to go off unleſs he were forced off.

Brackenridge, for the proſecution. The ſurvey under the warrant was a complete poſſeſſion of the land. The circumſtances of the *Indian* war rendering it impoſſible with ſafety to maintain that poſſeſſion, the act of 3d *April*, 1792, protects his poſſeſſion, as if he had actually maintained it; and renders every intruſion unlawful.— Though the two years after the warrant were expired, before any ſettlement was made, the *Indian* war is an 3 *St. L.* 212.

1796. apology, and there will be two years given after the war. It is a matter of great importance to determine whether, in case of a forfeiture of a claim under a warrant, for default of settlement in two years, the state only should take advantage by issuing a new warrant; or whether any individual can take on him to make an entry, and proceed to improve and settle.

PRESIDENT. We are not now enquiring who is intitled to the land, but whether *Thomas Lemmon* has committed an offence, by forcibly entering on the possession of *William Todd*; or having peaceably entered on *William Todd's* possession, forcibly detaining it.

It does not appear, that, at the time of *Lemmon's* entering on this land, *William Todd* was in possession of it. Surveying the land, building cabbins, and leaving them unfinished and empty, is not occupying or possessing the land. It seems to have been vacant. Entering on vacant land is not a public offence. And, after such entry, there can be no forcible detainer, for there was no possession in another, at the time of the entry.

2 *Burn* 179. 2 *Bac. Abr.* 558.

Verdict not guilty.

SOMERSET COUNTY.

December Term, 1796.

JAMES SPENCER *v.* WILLIAM TISUE.

THIS was an action of debt for 2000*l.* the penalty on an article of agreement for the purchase of a tract of land, sold by *Spencer* to *Tisue*, for 750*l.*

Of this price, it was admitted, that *Tisue* should have credit for 30*l.* 0*s.* 6*d.* paid by him for goods bought by *Spencer*, and also for the half of 78 dollars and 27 cents, the amount of excise duty on stills sold with the land: and, as to the other half of this duty, it was left to an amicable adjustment on circumstances.

Tiſue further claimed a credit for 20*l.* as the price of a ſet of ſmith's tools, which, it was proved, he had given to *Spencer*. But there was alſo evidence tending to prove, that he had given them as a preſent beyond the agreed price. 1796.

Another credit was claimed for 12*l.* the price of two cows ſold by *Tiſue* to *Spencer*. But there was evidence tending to prove, that one of the cows was for *Thomas*, ſon of *James Spencer*, in payment of a debt due by *Tiſue* to him.

Tiſue produced a receipt to him, given by *Mary*, the wife of *James Spencer*, for 263*l.* 17*s.* 6*d.* Of this ſum 226*l.* 7*s.* 6*d.* was actually paid to her, in the preſence of *Thomas* and *William*, ſons of *James Spencer*, and then of age; and it was then alſo admitted, that the reſidue, 37*l.* 10*s.* had before been paid to one of the ſons, to buy land for the family. There was alſo evidence, that *Mary Spencer* had given a receipt for but 226*l.* 7*s.* 6*d.*; that afterwards *Thomas Spencer* had borrowed of *Tiſue* 37*l.* 10*s.* to be paid in three weeks; and, he not paying, *Tiſue* prevailed on his mother to include this and the other ſum, in a new receipt to be given for the whole 263*l.* 17*s.* 6*d.* There was evidence, that, at this time, *James Spencer* had no fixed place of abode; that his wife and family lived in a houſe near *Tiſue's* which had formerly been *Spencer's*; that, of the 226*l.* 7*s.* 6*d.* *Thomas Spencer* paid 158*l.* 17*s.* 6*d.* and perhaps the whole of it, to one *Simeon Rice*, for another tract of land; that *James Spencer* ſent word to his wife to buy *Rice's* land, and he would pay the money, if he would ſell it on the terms propoſed, but there was alſo evidence, that he did not want to buy this tract, but wiſhed to go to *Kentucky*;—that it was agreed between *Thomas* and his mother, that the money ſhould be paid to her by *Tiſue*; that *Tiſue* ſaid he had paid the money to her, that ſhe might have a place to live on; that, after they left *Tiſue's*, *Thomas* ſaid, his father had diſcovered ſomething of the matter, and they muſt ſtart off directly; that his mother, with the aſſiſtance of *Tiſue* and his wife, diſguiſed herſelf, that her huſband might not diſcover her; that ſhe declared, ſhe bought *Rice's* land for her huſband; that *Thomas* lives on it, has got a deed for it, and ſays he will keep it; that *William*, with the permiſſion of his

1796. brother *Thomas*, built a cabbin on the land, that he allowed his father to go into it, and that his father and mother now live in it; and that *James Spencer*, after the purchaſe from *Rice*, ſaid, if he got the land, he would give *Thomas* a part of it, if he behaved himſelf like a ſon. A witneſs alſo proved, that he had endeavoured to perſuade *James Spencer* and his ſon *Thomas*, who claimed an intereſt in this land, as having claimed ſome intereſt in the land ſold to *Tiſue*, to agree about dividing between them the land bought of *Rice*; and, for this purpoſe, that he run a line dividing it equally; but that neither of them aſſented to it.

Young and *Morriſon*, for the defendant. The money received by the wife has been applied to the uſe of the huſband. There was a diſpute between *James Spencer* and his ſon *Thomas*, about the property of the land purchaſed from *Rice*. How could this ariſe, unleſs the land had been purchaſed by *James Spencer's* money. If the money was *James Spencer's*, this admits, that he had aſſented to the payment made by *Tiſue* to *Mary Spencer*. Though a wife can make no contract, yet, in many caſes, there is an implied permiſſion of the huſband, unleſs there be an abſolute prohibition. Wherever there is this permiſſion of the huſband, the wife's contract binds him. There is a plain colluſion between the huſband, the wife, and the ſon, to defraud *Tiſue*. If the land has been purchaſed with *James Spencer's* money, the land is his. The whole of this 263*l.* 17*s.* 6*d.* has been laid out in the payment of the land bought of *Rice*.

Nagle, and *Selby*, for the plaintiff. A wife cannot make a contract for a huſband. The 37*l.* 10*s.* was lent to *Thomas*, and is no payment to *James Spencer*. The authority of the wife was to purchaſe on the terms which the huſband had before propoſed to *Rice*. If ſhe purchaſed on other terms, he is not bound by the purchaſe. Therefore the payment to the wife is no payment to the huſband. There is no evidence, that the land was bought for the uſe of the huſband. *Tiſue* has made a wrong payment, with a fraudulent view to an improper perſon, and he muſt bear the loſs.

PRESIDENT. The policy of the law is, that marriage unites the two perſons in one, ſinks the wife in the huſband, and gives to the huſband the ſole right of manag-

ing the property of both. But with this union of perſons, it is not inconſiſtent, that the wife ſhould be the agent of the huſband: for this accords with the union of perſons, and the agent, like the wife, may be conſidered as the ſame perſon with the principal. 1796.

There are many occaſions, on which a wife, as agent for the huſband, appears as the principal. The cares of matrimony, the duties of management are divided, the huſband aſſumes ſome parts, and ſubmits other parts to the care of the wife: where he either acts or ſubmits he is bound. A huſband is often from home. Nothing is more common, than to pay to the wife, in his abſence, a debt due to the huſband. This is for the convenience of both parties; and ſeems to be conſidered as an implied agency. If *Tiſue* made his payment in this uſual way, it ſeems proper to conſider it as a payment to the huſband, on a preſumed agency, with which, in their common concerns, every wife is generally preſumed veſted.

But if *Tiſue intended*, by paying to the wife, to deprive the huſband of that management of the eſtate with which the law veſts him, it is a fraud on the huſband, to whom the payment ought to have been made, and is no payment.

But, at the ſame time, the huſband muſt not be indulged in a fraud on his part. For, if he have afterwards aſſented to this payment, or it have been applied to his uſe, and he accepts the benefits of it. This is a payment to him.

In this caſe, the wife has given a receipt for 263*l.* 17*s.* 6*d.* Of this, it appears, 226*l.* 7*s.* 6*d.* was actually paid to her. There is evidence, of which ye will judge, that 37*l.* 10*s.* alſo included in this receipt, was previouſly lent to the ſon. There is evidence, that 158*l.* 17*s.* 6*d.* part of the 226*l.* 7*s.* 6*d.* was actually given by the wife to the ſon *Thomas* and paid by him for *Rice's* land, on which the huſband now lives, the purchaſe of which he had contemplated and directed his wife to complete, and intereſt in which he claims, or has claimed. How the reſidue of the 226*l.* 7*s.* 6*d.* has been applied, we do not know: but the huſband and the wife live together in the ſame houſe; and it is ſaid, *Thomas Spencer* has got a deed for the land. *Thomas Spencer*, conſidering the title in him, has got land for which *he* has not paid. If

1796. he ſhall gain, who ſhall loſe, his father or *Tiſue?* The queſtion is whom ye will turn round for remedy. If the land was bought, with *James Spencer's* money, by any agent of his, the land is his. This land he was in treaty for buying, and it was bought by his wife and ſon, with money paid her in diſcharge of a debt due to her huſband.

What is the value of the ſmith's tools, and whether that and the price of the cow or cows ſhall be deducted, you will determine.

The only points in diſpute, therefore, are whether the money paid to the wife, the value of the ſmith's tools, and the price of the cow or cows, aſcertaining theſe ſums, ſhall be conſidered as payments made by *William Tiſue* to *James Spencer* on this contract.

The jury allowed credit for 263*l.* 17*s.* 6*d.* the ſum mentioned in the receipt given by the wife of *James Spencer*, and for 15*l.* as the price of the ſmith's tools, and for 6*l.* the price of one cow.

FAYETTE COUNTY.

December Term, 1796.

PENNSYLVANIA *v.* STEPHEN MYERS.

MYERS and one *Pratt* were ſuſpected of being concerned, with ſeveral others, in horſe-ſtealing and burglary. *Myers* was tried now for ſtealing a horſe. It was proved, that he ſold the horſe in *Maryland* for 40 dollars, and the owner valued him at 80 dollars.—*Myers* and *Pratt* were both in jail, on a charge of burglary. *Myers* told the owner, that he bought the horſe from *Pratt*. *Pratt* was not then preſent, but, afterwards, when aſked by the owner, ſaid, he never ſold or gave a horſe to *Myers*. At another time, *Pratt* ſaid, he had given *Myers* a horſe, which he had bought from a man whom he did not know. And, on the trial, he ſwore this, and that he had ſold him to *Myers* for 30 dollars. Declarations of *Myers* were proved, that he gave 12 dollars to *Pratt* for the horſe.

Pratt was committed to anſwer for ſtealing this horſe. 1796.
Simonſon, for the priſoner. The evidence, at moſt amounts only to proof of receiving ſtolen goods, knowing them to be ſtolen; and there can be no conviction on this indictment.

Young, for the ſtate. *Pratt* and *Myers* were confederates in this offence.

PRESIDENT. If *Myers* neither took this horſe, nor was preſent aiding and abetting at the taking, he cannot be convicted on this indictment; for taking is a material part of the larceny. But there is evidence, that *Myers* had this horſe; and, from this, it may be preſumed, that he took him, unleſs he can give a credible account of his having otherwiſe got poſſeſſion of him. You will therefore conſider whether the account, which he has made of this, be credible; or whether, like the fable of the two thieves and the butcher, it be one of thoſe tricks, which ſharpers and thieves uſe, to cloak their common villany.

Verdict guilty.

Simonſon, moved for a new trial on two grounds;— 1. that the verdict is contrary to evidence; and, 2, that the direction to the jury was wrong.

PRESIDENT. 1. The jury had evidence, on which they might find the verdict, as they found it. The direction ſtated this to them. 2. We are yet of the ſame opinion we then gave.

ALLEGHENY COUNTY,

March Term, 1797.

WILLIAM M'LAUGHLIN *v.* GEORGE THOMSON.

THIS was an action of *indebitatus aſſumſit*, for work 1797.
done, in digging a mill-race. The defence was, that the work was unſkilfully done, contrary to the directions of the employer, much to his injury, and unſi-

1797. nifhed in depth. The plaintiff contended, that when a mill-race was to be dug any certain depth, in declining ground, its depth is to be meafured by laying a board acrofs the race, and meafuring its depth from the middle of its width.

PRESIDENT. When it is agreed that a race be dug through declining ground, to be of a certain depth, this depth muft be meafured from the lower brink, and the bottom be made level, fo that when there is an inch of water at the lower fide, there fhall be an inch every way acrofs. A race three feet deep muft be a race that will contain every where three feet depth of water.

WESTMORELAND COUNTY,

March Term, 1797.

JOSEPH DIXON *v.* CHARLES M'CLUTCHEY.

ASSUMSIT, on an undertaking, in the fale of a horfe, that the horfe was found, with an averment, that he was unfound of the yellow-water, and thereof died. There was another count of *indebitatus aſſumſit*, for money had and received.

There was evidence on both fides.

PRESIDENT. 1. There is no expreſs warranty or undertaking. The price is leſs, than of a found horfe of the fame appearance. There is evidence, from a converſation between the parties at the fale, that it was underſtood by both, that the horfe might be unfound. The plaintiff therefore took his chance, and cannot recover, on the firſt count.

2. But fraud vitiates every contract, and one man, who fells a horfe to another, knowing a material defect, which in equity and good conſcience he ought to diſcloſe, and does not; if it be not known to the buyer, or ſuch as a buyer of common prudence muſt be preſumed to know; this is ſuch a fraud as vitiates the contract, and the buyer may call for his money again.

Verdict for the defendant.

JOSEPH COOK, assignee of ROBERT LAUGHLIN, *v.* JOHN AMBROSE.

1797.

DEBT on a bond of 300*l.* dated 12th *April*, 1790, conditioned for the payment of 30*l.* with legal intereſt for the ſame, on 1ſt *April*, 1795, aſſigned 12th *March*, 1794; and on another bond of the ſame date, for the payment of 30*l.* on 1ſt *April*, 1796, with legal intereſt on the ſame, alſo aſſigned 12th *March*, 1794.

Young, for the defendant, offered to prove, that the agreement was, that intereſt ſhould not be paid from the date, but from default of payment on the day preſcribed. And he obſerved, that the obligation is not to pay the money with intereſt *from the date*, but *with legal intereſt for the ſame*. This is inſerted ignorantly and without neceſſity, as we ſometimes ſee inſerted, with intereſt *from the time of payment, if not then paid.*

Armſtrong objected to this teſtimony, as contradicting a deed, by parole teſtimony.

PRESIDENT. In the caſe of *Moſes v. M'Ferlan*, it is ſtated, that an agreement was made, that the indorſement then made on a note, to enable the indorſee to recover in his own name, againſt the drawer ſhould not be uſed againſt the indorſer, and that, contrary to this agreement the indorſee ſued the indorſer, in the court of Conſcience, that the indorſer ſet up this agreement, and the court of Conſcience rejected it as a defence againſt a ſuit there on the indorſement; and the court of King's Bench held, that the court of Conſcience did right; but that this agreement was a ground of action of *indebitatus aſſumſit*, to recover back the money. I do not ſay whether this is, or is not, a ſimilar caſe. This is no collateral matter. Neither was that. The one is a fraud. The other is a miſtake in the original tranſaction. This court has juriſdiction over the demand and the defence. The practice here on our act of aſſembly, in admitting defences againſt aſſigned obligations is more favourable to the defence, than in *England* on the act of parliament. I hardly think the principles of our practice juſtify allowing againſt an aſſignee any defence not ariſing out of the original tranſaction, or the framing of the oblig-

2 *Bur.* 1005.

1797.

See Davis v. Cammel ante 233.

ation, or subsequent direct payment. No fraud is suggested in *Laughlin* or *Cook*, but a mistake common to both the original parties, which it was as much the business of *Ambrose*, as any other, to prevent or correct. As he did not prevent or correct this mistake, but signed the bond, and gave it a currency, why should not he take the consequences, rather than *Cook*, who must now be considered as a *bona fide* assignee for a full consideration. Whether the proof be admissible seems to depend on what is the clear exclusive meaning of the words "*with legal interest for the same.*" There would be no reliance on written contracts, if their plain meaning may be contradicted by parole testimony. If, exclusively of any other, their meaning be the same as of *with interest from the date*, the evidence seems inadmissible. Whether or not this be their meaning, we will hear you argue.

Young, for the defendant, declined any further argument, and, by consent, there was a verdict and judgment for the plaintiff.

ALLEGHENY COUNTY.

June Term, 1797.

PENNSYLVANIA *v.* CHARLES KERR, RICHARD M'ANULTY, JAMES M'ANULTY, and JOHN M'ANULTY.

THIS was an indictment for a riot in assaulting and beating *William Stuart*.

John M'Anulty was an apprentice to *William Dunning*, and run away from his service. *Dunning* published an advertisement of his escape, offering a reward for taking and securing him. *Stuart* went with the advertisement, to the house of an uncle of *John M'Anulty*, about eight or nine of the clock, in the evening of the 31st *December*, 1796; there found *John M'Anulty* in com-

pany of the others indicted; and seized *John*, on the authority of the advertisement, as a runaway apprentice. *Stuart* swore, that *John M'Anulty* and the others beat, kicked, and bruized him. 1797.

Brackenridge, for the defendants, objected to shewing the advertisement, and contended, that the master could not give authority by advertisement, to take his runaway apprentice; for "an act for the regulation of appren- 1 *St. L.* 540, tices" points out a particular proceeding in case of ap- 541. prentices absconding. At common law, the master himself might take the apprentice, but could not enter the house of another, and take him by violence. Even *Ib.* 542. an officer with process cannot break open a door. The master has an action on the case.

Galbraith. This objection, which might be made by the owner of the house, lies not in the mouth of the defendants, who were not the owners.

PRESIDENT. If Mr. *Brackenridge* require it we will reserve the point; but, at present, we have little doubt. At common law, a master had a right to take up his runaway servant; and, for this, as for any other lawful purpose, might enter peaceably into any house, unless forbidden by the owner. Any person with authority from the master might do the same. If he abuse this authority, he is answerable. An advertisement is a general authority; but he who acts under it, does so at his peril; that is, he runs the risk, that the advertisement is genuine, and that its publisher had authority. The domestic authority of parents and masters must be supported, as essential to the peace of society, and contributing to a due subordination to the authority of government. The act of assembly does not change the common law, but gives a further remedy.

This point was not further pressed. But, there being evidence for the defendants, contradicting the force sworn to, the jury returned a verdict, not guilty.

HIGH COURT OF ERRORS AND APPEALS,

At Philadelphia, July, 1797.

ANNE M'PHERSON, widow, *et al*, deviſees of ROBERT M'PHERSON, *v.* ALEXANDER M'PHERSON.

1797.

IN an action in partition brought in the Common Pleas of *Cheſter* county, and removed into the Supreme court, on a caſe ſtated, it was ſubmitted to the Supreme court to determine, whether *Alexander M'Pherſon* and *Robert M'Pherſon* were tenants in common or joint tenants, under the will of *John M'Pherſon*. If they were joint tenants, there was to be judgment for the defendant; if they were tenants in common, there was to be judgment for the plaintiffs.

The opinion of the Supreme court was, that they were joint tenants; and judgment was entered there for the defendant.

On this, a writ of Error was brought; and the caſe appeared as follows:—

On 23d *November*, 1762, *John M'Pherſon* made his will, which, after directing all his debts, &c. to be paid; giving his wife 100*l.* with all his furniture (except the clock) his ſorrel mare, a lodging room, the keeping of one cow, and proviſion neceſſary for her table during life; and directing, that, if ſhe marry, ſhe ſhould then quit her claim to the lodging room and table neceſſaries; proceeds thus:—"I give and bequeath to my ſon *Alexander*, the plantation whereon I now dwell, to him and to his lawful heirs, alſo my clock. I give to my ſon *Robert* the plantation whereon he now dwells, to him and to his lawful heirs and aſſigns. *Item. I further give*

1797. *and bequeath to my ſons Alexander and Robert all that plantation or tract of land I purchaſed from Samuel Williams, to them and their lawful heirs and aſſigns, to be in full poſſeſſion of the ſaid Alexander and Robert, until ſuch time as my ſon John perſonally appears, and demands the ſaid plantation; and when he does appear, and demand the ſaid plantation, then it is my will, that my ſons Alexander and Robert, or their lawful heirs, do peaceably and quietly yield and give up the ſame to my ſon John.* I give to my daughter-in-law *Sarah* 10*l.* to be paid in one year after my deceaſe. And, if any money is remaining of my perſonal eſtate, after my ſaid legacies and bequeathments are fully paid, then it is my will, that the ſame be equally divided between my wife and my ſons *Alexander* and *Robert*. I order and appoint my wife and my ſons my ſole executors, &c."

His ſon *John* has not yet returned, nor is it known what has become of him. *Robert* made a will, and deviſed his real eſtate to his wife and children. He died. They ſurvived him, and are the plaintiffs in the writ of Partition, and the writ of Error. *Alexander* is the brother of *Robert*, and claims as joint tenant under his fathers will and ſurvivor.

3 *Burr.* 1541, 1570, 1579, 1581.—2 *Bur.* 1112.—2 *P. Wms* 673. 3 *Burr.* 1541. 1 *Burr.* 233. 3 *Bac.* 198. *Moor.* 558. 1 *Vern.* 353. 1 *Ves.* 166. 2 *Ves.* 258. 3 *Atk.* 734. 1 *Wils.* 165. 1 *Salk.* 158. 1 *Eq. Ca. Abr.* 203. 3 *Burr.* 1581. 2 *Ves.* 258. 1 *Ves.* 521.

Wilcocks and *Tilghman*, for the plaintiffs. The rules for conſtruing wills are the ſame at law as in equity.—In equity, joint tenancy is ſaid to be odious. It is ſettled, that the intention of the teſtator prevails, if not againſt any rule of law. And tenancy in common will rather be favoured, than joint tenancy. The court will preſume a tenancy in common, unleſs there be plain words to the contrary.

In a caſe, where the legal words make a joint tenancy, lord *Mansfield* relies on the circumſtance of the teſtator having a pride in his family; and, without any words ſhewing a tenancy in common, it has been conſtrued from the circumſtance of money being advanced by both. It is doubtful, whether, by *lawful heirs*, an eſtate tail is not created.

In this caſe, if the deviſe to *Alexander* and *Robert* had ſtopt at giving the eſtate, it might have been more doubtful. The ſubſequent words ſhew, that a tenancy in common was intended. This plantation was to be in the *full poſſeſſion* of *both*, until *John* ſhall demand it. If,

during the life of both, *John* demand it, *both* were to give it up. If, before *John* demand it, either or both die, the words are not, the ſurvivor or his heirs ſhall give it up to him; but that they or *their* heirs ſhall give it up to him. This, *reddendo ſingula ſingulis*, plainly implies, that the heirs of both might be in poſſeſſion; and this could be only by a tenancy in common. Theſe words are equivalent to a deviſe to them and their heirs *reſpectively*. It is not neceſſary, that there ſhould have been words to ſhew, that each ſhould hold in ſeveralty: there are none ſuch in any tenancy in common. They hold *per my et per tout*, till an actual diviſion is made. 1797.

The teſtator ſeems plainly, from the whole will, to have intended a perfect equality to his ſons, *Alexander* and *Robert* and to have intended an equal proviſion, out of his real eſtate, for his abſent ſon *John*, if he ſhould return. He makes his two preſent ſons executors. All is impartial; and it cannot be ſuppoſed, that he could have intended, that if, as in the preſent caſe, one of his ſons, leaving a numerous family of children, ſhould die before the other, the ſurvivor ſhould enjoy two-thirds of the eſtate. He intended an equal ſhare to each of his children, and that each ſhould tranſmit this ſhare to his deſcendants. The court will give effect to this juſt intention, and declare this to be a tenancy in common.

T. Roſs, for the defendant. I admit, that the intention of the teſtator, governs the conſtruction of the will, where it is not contradicted by any expreſs rule of law. But this intention muſt be collected from the will itſelf, and not from extraneous circumſtances. The words *equally to be divided*, or *ſhare and ſhare alike*, or to them and their heirs *reſpectively*, have been ſufficient to make a tenancy in common. 2 *Atk.* 121. *L. Ray* 692.

An eſtate in joint tenancy is created by a grant to two and their heirs. The general preſumption is in favour of joint tenancy, unleſs there be words ſhewing a different intention. The clauſe in this will is, "I give to my ſons *Alexander* and *Robert* all that plantation, to them and their lawful heirs." This is clearly a joint tenancy, and, had he ſtopt here, there would have been no doubt. What is there, in the ſubſequent words, to change this conſtruction? The object of the teſtator, in this clauſe, was a proviſion for *John*, not for *Alexander* and *Robert*, and their children. 2 *Comm.* 179. 81.

1797. It does not appear which was the eldeſt, whether *Alexander* or *Robert*; and, if it did, it could not effect the conſtruction.

Though courts may lean to tenancy in common, it is always on neceſſary inference from the words of the will, not from ſurmiſe. To found a conſtruction on any other preſumptions than thoſe to be drawn from the will itſelf, is to make a will; and to do ſo in this caſe would be to make a will for a man who died thirty-five years ago.

The court of Errors and Appeals held this to be a tenancy in common, and reverſed the judgment of the Supreme court. But in this they were not unanimous. Their opinions were ſomewhat as follows:—

SHIPPEN and COXE, J. held it to be a joint tenancy.

1. Here is a clear joint eſtate veſted in *Alexander* and *Robert*; and it cannot be deveſted without a clear intention expreſſed.

2. No ſuch clear intention appears, nor any clear intention, that this ſhould be a tenancy in common.—The words, uſed in creating the obligation to ſurrender, are the ſame as thoſe uſed in creating the eſtate. They are therefore to be conſtrued in the ſame way in both parts of the will; and the meaning is, that whoever, under the will holds the eſtate at the time of the demand, ſhall then ſurrender it.

3. As to equality, this conſtruction equally ſecures it: for either had an equal chance to ſurvive the other.

CHEW, Preſident, and SMITH, ADDISON, HENRY, and RIDDEL, J. held this to be a tenancy in common.

1. It appears, from the whole of this will, that equality between the two ſons *Alexander* and *Robert* was intended. And ſuppoſing, in reſpect of age and health, their chances equal, the equality ought to be conſtrued a real, and not a caſual equality.

2. Courts in *England* have gradually inclined to conſtrue in favour of tenancy in common; and, from this progreſs of judicial opinions there, and the ſtate of property here, we ought to lay hold of every poſſible conſtruction, to make it a tenancy in common.

3. The natural, if not the neceſſary conſtruction of the direction, that his ſons *Alexander* and *Robert*, *or* their heirs, ſhould give up the plantation to *John* is, that his

ſons, if both alive ſhould give it up; or if either of them were dead, that the ſurvivor, and the heirs of the other ſhould give it up; or, if both were dead, that the heirs of both ſhould give it up: and this conſtruction can conſiſt only with a tenancy in common. 1797.

4. Though the deviſe be in the ſame words *to them and their heirs*, yet theſe have a technical meaning in a grant, and there is no reaſon to incline us, in favour of a joint tenancy, to ſtretch them to the ſame ſenſe in a clauſe out of the ordinary form. In the grant, the expreſſion is to them *and* their heirs. In the condition, it is to them *or* their heirs.

5. Though there be no precedent for conſtruing a tenancy in common from words like theſe, this conſtruction is in the ſpirit of former deciſions; and there was a time when there was no precedent for conſtruing a tenancy in common from the words *equally to be divided, &c.*

6. This is a contingent truſt: it is yet poſſible that *John* may return, and demand the eſtate. Now it is a truſt coupled with a preſent intereſt.

ALLEGHENY

ALLEGHENY COUNTY,

September Term, 1797.

PENNSYLVANIA *v.* CHRISTIAN BUGHER, DAVID GILLILAND, BARNABAS GILLILAND, and WILLIAM RYAN.

1797.

THIS was an indictment for a riot, on 2d *March*, 1797, in assaulting and threatening to shoot *John Watt*, and in burning his house. The prosecutor claimed a tract of land of 329 acres, west of the *Allegheny* river, surveyed 3d *May*, 1794, on a warrant dated 14th *February*, 1794; and built a cabbin, and proceeded to clear land, and make improvements. The defendants were settlers, who, in *March*, 1796, presuming all warrants forfeited, went over the river to improve land, as the expression is, and gain a title by settlement. *Bugher* improved, built a cabbin, cleared, and fenced, and lived within the survey, under which *Watt* claimed. Evidence was offered, that *Bugher* made lines round his claim, improved, and resided on it. 3 *St. L.* 209.

Woods, for the prosecutor, objected to any evidence of title or possession, because *Bugher* had no right to use force. His remedy was by indictment for a forcible entry: and any force by the defendants was a riot. 1 *Hawk.* 294 5.

Brackenridge, for the defendants. Force to a certain reasonable extent is lawful in defence of one's possession.

PRESIDENT. It is proper to permit *Bugher* to shew, that he had a possession circumscribed by reasonable limits.

Evidence was then given, that *Bugher* had found old lines round his improvement, and intended to claim to them, expecting to hold 400 acres; that he settled on it in *March*, 1796, with his family, has lived on it since, built a cabbin, and cleared, fenced, and planted a field of six or seven acres.

1797. It did not appear, that *Watt* had made any improvement on the land ſurveyed for him, when *Bugher* went to improve there. *Watt's* cabbin was about an hundred perches from *Bugher's*. There were rails cut, and bruſh-heaps, before *Watt* came on the ground where he cleared.

The defendants came to *Watt's* cabbin, ordered him to leave it, felled trees on it, threatened to ſhoot him, (one of them had a rifle gun) threatened to faſten him to a log-chain, and drag him with a horſe out of the lines, and they ſet fire to his cabbin, and burnt it.

Brackenridge. The act of 3d *April*, 1792, makes warrants void without ſettlements in two years. A man may keep others off from his own poſſeſſion.

Woods. *Watt* had a right to enter peaceably on his own land, to make his ſettlement required by law.—Whatever *Bugher's* claim may have been, he is not juſtifiable in uſing force, in taking poſſeſſion. Any violent execution of a private enterprize, whether lawful or unlawful, is a riot.

1 *Hawk.* 274, 293 4.

PRESIDENT. To burn a houſe, the habitation of a man, and with a man in it, is an outrage not to be juſtified.

Verdict, that *David Gilliland*, *Bugher*, and *Ryan* are guilty.

NOTE.—There was another indictment, of a ſimilar nature, againſt *David Gilliland*, and *Barnabas Gilliland*, for aſſaulting *Thomas M'Connel*, breaking open his dwelling houſe, throwing out his goods, and throwing down his houſe. *M'Connel* claimed under a warrant. *B. Gilliland* claimed by ſettlement. The jury found *David Gilliland* guilty.

PENNSYLVANIA *v.* JOHN HUSTON, DANIEL CARTER, and WILLIAM WILSON.

THIS was an indictment for a riot, on 9th *January*, 1797, in beſetting the dwelling-houſe of *Felix Welſh*, aſſaulting and beating *James Welſh* and *Thos. Welſh*, minor children of the ſaid *Felix*, throwing his goods out of doors, and demoliſhing his houſe.

In the ſpring of 1793, *Huston*, one *Myers*, and others went to look for land to ſettle on. In the ſpring of 1794, *Myers* raiſed a cabbin. *Huston* bought it from him, and, about *February*, 1796, built a cabbin, cleared a field of about four acres, planted it with corn, cleared upland, ſowed it with wheat, worked on it conſtantly, when he was not working with others, agreed with the neighbours as to boundaries, but run no lines. 1797.

In *March*, 1796, *Felix Welſh* came with his family, to ſettle in this neighbourhood; found a cabbin, went into it, and lived in it. On his way thither, he was warned by *Huston*, that he ſhould not come lower down, than this old cabbin. Next winter *Ennion Williams* (agent to the population company, under whom *Welſh* claimed) aſſiſted *Welſh* to build another houſe, about twenty perches further down, on the corner of three tracts ſo that his improvements ſhould lie on each of the three. *Welſh* went into this new houſe with his family; and while he and his wife were abſent, the defendants came, threw the beds, in which were ſome of *Welſh's* children, out of doors, threw out alſo what things were in the houſe, and threw down the houſe.

PRESIDENT. A ſurveyor, if juſtifiable, ſurely cannot be compelled, to make a ſurvey without a warrant, unleſs there be an *actual ſettlement*. An actual ſettlement is to be conſidered as meaning the ſame thing in the act of 3d *April*, 1792, as in the act of 30th *December*, 1786; 3 *St. L.* 209. " an actual perſonal reſident ſettlement, with a manifeſt 2 *S. L.* 488. intention of making it a place of abode, and the means of ſupporting a family, and continued from time to time, unleſs interrupted by the enemy, &c. The law of 1792 3 *St. L.* 212. ſeems to juſtify defining an actual ſettlement to be a clearing, fencing and cultivating at leaſt two acres for every hundred claimed, and erecting thereon a meſſuage for the habitation of man. Such ſettlement with a reſidence of five years intitles to a patent on the payment 3 *St. L.* 210. of the fixed price. A warrant operates againſt a ſettlement from the date of its entry with the ſurveyor.— There was a ſurvey of this land in 1795, on a warrant under which *Welſh* claims. There was no ſettlement by *Huston* till 1796. A ſettlement had been begun, but not accompliſhed before; and if the excuſe of war will ſave the ſettlement, it ſaves the warrant; and the

1797. warrant was entered before the ſettlement was completed. The clauſe excuſing ſettlements, in caſe of war, and perſiſting in endeavours to make them, ought to be conſtrued *reddendo ſingula ſingulis*. The actual ſettler who has made a ſettlement is excuſed from *continuing* it, if he be driven therefrom by force of arms of the enemies of the *United States*. The grantee by warrant is excuſed from *making* an actual ſettlement, if he be prevented from making ſuch ſettlement by ſuch force.

The law has in view two ſorts of actual ſettlers; one deriving title from their warrants, the other from their ſettlements. Both titles are to be equally protected, becauſe both are equally lawful. The one ſettler begins his title with money, and muſt complete it with labour. The other begins it with labour, and muſt complete it with money. Money is the fruit of labour. Whether the title be begun with money, or with labour, the ſettlement of the country is provided for. But when theſe different titles interfere, which ſhall give way? The warrant excludes the ſettlement, only from its entry with the ſurveyor. But before this entry, the grantee has paid his money, perhaps the ſavings from the labour of years, into the Land-Office. And in the mean time, perhaps between the date and the entry of the warrant, another goes and makes an improvement on the land. Which title ſhall give way? If the improver has ſo far proceeded, as to have made an actual ſettlement, the grantee muſt loſe his money, and drop his claim. But if the improver has not ſo laboured as to have made an actual ſettlement; why, ſince one muſt loſe, may not he as well loſe his labour, as the grantee loſe his money?

But there was no ſurvey for *Huſton*, and therefore we know not whether this houſe was within his claim; nor, if it was, whether his claim ought to have included it; for he may have claimed more than 400 acres, and ſo had no right to exclude other ſettlers. A man in actual poſſeſſion of part is in poſſeſſion of all the reſt of only his lawful claim. If a man ſettles on land without any ſurvey, he may perhaps make vague boundaries incloſing a thouſand acres; while he is intitled to only four hundred. This can never be ſuppoſed to be ſuch a poſſeſſion as will exclude others from ſettling within ſuch claim.

Huston, therefore, having no ſurvey, ought not to have uſed the force of demoliſhing the houſe; but ought to have proceeded to aſcertain his right, and proſecute it in a legal way. 1797.

If no more than one was concerned, all muſt be acquitted.

The jury found a verdict—not guilty.

Leſſee of WILLIAM DICK *v.* GILBERT CAMERON.

EJECTMENT for 400 acres of land on *Watſon's* run. This was for land weſt of the *Alleghany* river, and the claim on both ſides was, as actual ſettlers, under the law of 3d *April*, 1792.

The evidence for the plaintiff was as follows.—*William Watſon*, a mill-wright, while engaged in building a ſaw-mill for *David Mead* at *Meadville*, in 1793, made an improvement, about five miles thence, cut down ſome trees, deadened ſome, and put his name on a tree, without intending to live there; and ſold this improvement to *William Dick* for 3*l*. *Dick* came to *Meadville* in 1794, lived there, and followed his trade of a carpenter. In *June*, 1794, he built a cabbin, 16 by 14 feet, near *Watſon's* improvement, put the ribs on, but did not finiſh it. It was common for the inhabitants of *Meadville* to go out in companies armed, and make improvements. They did not confine themſelves to one improvement for each. In 1795 the *Indians* killed two men, about five or ſix miles from this improvement, and one man near the town.

Brackenridge, for the plaintiff, offered to prove a ſurvey made for *William Dick*.

Woods objected to this, until a warrant, or an actual ſettlement, were firſt proved. 3 *St. L.* 211.

Brackenridge. What is an actual ſettlement? It is inconvenient to ſay, either that the firſt act of labour ſhould be ſufficient, or that actual dwelling on the land ſhould be required. We ought to take an intermediate ſtate,

1797. The act of 1786 is to be underſtood as applicable only to the ſubject then in view, to protect ſettlements
2 St. L. 488. formed. In early times in this country, county courts protected improvements to a wild extent, even the marking of a name on a tree. When the judges of the Supreme court came out here, the chief-juſtice, a lawyer from *Delaware*, unacquainted with the land deciſions of *Pennſylvania*, and with any thing but paper titles, went to the contrary extreme, and excluded all evidence of improvement. Alarmed at this, in the aſſembly of 1786, I introduced the law protecting ſettlements. And ſince, even in caſes commenced before that law, the chief-juſtice and the judges of the Supreme court have changed their principles, and have declared that ſettlements give title, and that they would decree a warrant.

3 St. L. 210-1. But the expreſſions in the law of 1792 are not to be controlled by the law of 1786, but to be explained by what the legiſlature of 1792 intended to accompliſh. Their intention was to give land to thoſe who ſhould expend labour on it. How was this to be done? The ſettler muſt firſt go and explore the country, then ſelect a ſpot, and ſet a mark on it, put his name on a tree.—This ought to be reſpected by every other, and be protected. He would next deaden the trees, and ſo proceed in a ſeries of acts, all which taken together, the jury, with chancery powers, will declare to be a ſettlement. And we muſt begin with the firſt act, and detail the progreſs till the ſettlement is accompliſhed. The ſurvey ought to be the firſt act. The man is on the ground. And he ought to have it in his power to require the ſurveyor to mark his boundaries, in order to keep off others.

Woods. Thoſe who take out warrants are actual ſettlers, as well as thoſe who begin by improvement; for they muſt make an actual ſettlement within two years.
3 St. L. 212. The improver begins by improvement and ſettlement, and muſt take out a warrant in ten years. The object of both is to effect actual ſettlements. The argument on the other ſide is calculated for the protection of *land-*
3 St. L. 210-1. *jobbing* improvements. The act requires the ſurveyor to ſurvey only for thoſe who have made actual ſettlements. No lands are protected againſt warrants, but ſuch as are actually ſettled.

Brackenridge. I agree with all that has been ſaid, and offer the ſurvey as proper evidence in part. But it will fail unleſs we can ſhew a ſettlement. 1797.

PRESIDENT. No doubt this may be proper evidence in part; but the proper order is to prove an actual ſettlement firſt, and, having done that, then to prove a ſurvey. The queſtion whether an actual ſettlement has been made, involves a point of law to be determined by the court. Whether the party has done certain acts, is a queſtion of fact, which the jury muſt decide. Whether thoſe acts amount to an actual ſettlement is a queſtion of law which the court muſt decide.

It was then proved, that, in *June*, 1795, *Dick*, with other improvers aſſiſting him, made between 300, and 400 rails, put them up in a fence, four rails high, incloſed about one-third of an acre, dug it with a hoe, planted corn, potatoes, and garden-ſeeds, and returned home to *Meadville*.

Brackenridge then propoſed to prove, that, in *September*, 1795, *Dick* put another perſon on this land, as his agent, to improve for him.

Woods objected to ſuch teſtimony. No perſon, who has not a warrant, can, under the act of 1792, derive a title from a ſettlement, unleſs it be made by himſelf. The grantee of a warrant may either make or *cauſe* to be made, the actual ſettlement required. The improver without warrant muſt *make* an actual ſettlement.

Brackenridge. The diſtinction is too ingenious, and favours more of the caſuiſtry of the ſchools, than the ſound deductions of reaſon. This could not be the meaning of the legiſlature. Law is founded on reaſon, and on various other grounds, one of which is principles or maxims. This is one of the nobleſt grounds of the law; and one maxim is *Qui facit per alium facit per ſe.* It muſt have been the intention of the legiſlature to provide for thoſe who are not able to ſupply themſelves with proviſions, and might wiſh to engage as agents to others for money, or a part of the land. It is true the law has been abuſed, by the appropriation of many tracts by means of agents.

Woods. Thoſe agents and their employers can be equally provided for, by ſuppoſing the title veſted in the agent, under an agreement to convey to the employer.

1797. PRESIDENT. The law of 1792 has it in view to accommodate two different deſcriptions of perſons; thoſe poſſeſſed of money, which they were deſirous to employ in the purchaſe of even more land than they could occupy themſelves; and thoſe who, without money, were deſirous to appropriate to themſelves a tract not exceeding 400 acres of land, as a reſidence and fund of ſubſiſtence. This law, therefore, has two objects, to increaſe the money in the ſtate treaſury, and to ſettle the frontier lands. Whether theſe views of the legiſlature be ſo compatible, as to be effectually and beneficially purſued together, and which, when they claſh, ought to be favoured, ſome may doubt.

However this may be, vaſt quantities of land have been appropriated or claimed by individuals, by both methods. The claim by one man of any quantity, however great, by means of money, was plainly within the view of the legiſlature, and is ſanctioned by this law. The claim, by one man, of any quantity exceeding 400 acres, by means of labour, was not within the view of the legiſlature; and having been made in a manner, and to an extent, amounting to an abuſe of the law, we ought to lay hold of any words in the law to reſtrain it within the bounds which the law meant, 400 acres.

3 St. L. 211.

We have, on former occaſions, expreſſed an opinion, from which we now ſee no reaſon to depart, that it will beſt accompliſh the objects of the law, to ſay, that no title ſhall be derived from a ſettlement, but to the perſon by whom the ſettlement was made; and that the ſurvey ought to be made for the reſident ſettler, and not for the employer. The ſurveyor is to ſurvey for him who *has made* the ſettlement. The grantee of a warrant is to make, or *cauſe to be made*, the ſettlement. As theſe words will juſtify this conſtruction, if this conſtruction will beſt effect the views of the legiſlature, (and we think it will) the conſtruction of the law ought to be limited by theſe words.—The law will then ſtand thus. He who would appropriate land by means of labour, muſt limit his claim to 400 acres; the labour muſt be exerted by him or under his direction; he muſt reſide on this land, and make it the reſidence of his family. If any man would appropriate to himſelf more than 400 acres, he muſt begin with money, and take out a war-

3 St. L. 211, 212.

rant. He who would appropriate land by money, may appropriate to himſelf any quantity whatever, for which he can purchaſe warrants, and proceed to make or cauſe to be made the ſettlements required by law. Thus the rich are permitted to engroſs land, only by means of money, and an opportunity is left to the poor to provide a competence, by means of labour. But if the rich were permitted to engroſs both by money and by labour; the poor would be excluded from all means of procuring land. 1797.

But however this might incline us to conſider the teſtimony as improper, we will not ſo far determine the point as to exclude it. We will therefore receive the teſtimony, but under this condition, that, if there be a verdict for the plaintiff, the defendant ſhall have leave to move to ſet it aſide on this ground, and to have judgment of nonſuit entered.

Evidence was then given, that, in *September*, 1795, *Dick* put one *Muſhruſh* in poſſeſſion of this land, that there were then leſs than an acre in corn and potatoes planted in the ſpring before, and, though no cabbin was near this, there were three on this tract of land, two of which were underſtood to have been built by *Dick*; that *Muſhruſh* and his ſon went into one of them, but that his family was not in that part of the country; and that he cleared, and burned bruſh; that in *March* or *April*, 1796, he was clearing, had about four acres cleared, and had timber cut for rails; that *Dick* then went to warn *Cameron* off; that *Cameron* was not then on the place, that he claims two or three other places, and has two ſons, one grown up fit for a man's work, another not ſo, and that his wife reſides in *Meadville*; and that one *Jackſon* was then on the place.

Brackenridge then offered to prove, that *Dick* had made a ſurvey round this land.

Woods objected, becauſe no actual ſettlement had been made.

PRESIDENT. If the ſurvey was made during the time that *Muſhruſh* was reſident on the land, it may be given in evidence as an act of his or of *Dick*, circumſcribing the boundary of his ſettlement then begun and proſecuting.

1797. A witneſs then ſwore, that, in *April*, 1795, he run the cloſing line of a ſurvey for *Dick*.

On the part of the defendant, it was proved, that, in *Auguſt*, 1793, he raiſed a houſe on the land, that another cabbin was built on another place for his ſon, a working lad; that the *Indians* were troubleſome, and he left that part of the country, and went to *Northumberland* county, where he had his family; that, in ſpring 1794, he prepared to remove with his family, which, being large, he could not take over the mountains then, left them on the weſt branch of the *Suſquehannah*; that he proceeded with his eldeſt ſon, lived in the cabbin, and worked on the land; that, in harveſt, he returned, and brought up his family to *Pittſburgh*, where he ſaid he would leave them, till the *Indians* were ſettled; that, in *May* or *June*, 1795, he with others planted an acre of corn and potatoes, digging the ground with their axes; that, before *Muſhruſh* came on the land, or into that part of the country, *Cameron* had put one *Jackſon* on it for him; and that *Jackſon* has continued to live on it ever ſince. It was alſo proved, that *Muſhruſh* worked on another place, but reſided generally near *Pittſburgh*; that among the company with whom *Dick* went in 1794 to make improvements, it was agreed to draw lots for the improvements; that *Dick* drew that near *Cameron's* cabbin; that they knew of *Cameron's* cabbin, and ſeveral other cabbins; that they declared, if thoſe who had made the cabbins returned, they would give up their claims; and that *Dick* has another improvement, and lives with his family at *Meadville*.

PRESIDENT. It does not appear, that any one for *Dick* lived on this land, before *Muſhruſh*; and before him, *Jackſon* was placed on the land, and has continued to reſide on it, in oppoſition to *Dick*.

Verdict for the defendant.

MARCUS HULING *v.* ISAAC CRAIG.

THE plaintiff had undertaken to carry a quantity of proviſions for the troops, by water, from *Pittsburgh* to *Fort Le Bœuf*. When at *Fort Franklin*, he found *French-creek* ſo low, that he did not proceed fur-

ther. The defendant was obliged, at a great expence, to employ pack-horſes, to carry the cargo from *Franklin* to *Le Bœuf*. This action was brought for the freight from *Pittſburgh* to *Fort Franklin*; and, againſt this demand, the defendant ſet up the extra expence of land carriage from *Franklin* to *Le Bœuf*. 1797.

PRESIDENT. It muſt be impoſſibility, not difficulty, that will excuſe from performance of a contract. If complete performance become impoſſible from a cauſe not within the power of man to control, the loſs ought perhaps to be divided.

WESTMORELAND COUNTY.

September Term, 1797.

DANIEL St. CLAIR *v.* DANIEL JONES.

CASE for enticing away and harbouring a ſervant boy.—

Young, for the plaintiff, offered an indenture ſigned by the plaintiff, purporting to be a binding of a minor boy, by his guardian, to the plaintiff.

Semple, for the defendant, objected, becauſe it was ſigned only by the plaintiff, and not by the guardian.

Young. We will prove, that an exact counterpart of this was executed by the guardian.

PRESIDENT. The teſtimony cannot be received.—But, if you pleaſe, we will reſerve the point.

Young then offered to prove by the guardian, that he did execute a counterpart of this indenture.

PRESIDENT. This cannot be admitted, unleſs its loſs be proved. We will reſerve this point alſo if you pleaſe.

Young then offered to prove, that the guardian did bind the boy to the plaintiff.

PRESIDENT. This muſt be rejected, as the other evidence was; ſince you have ſtated that a deed exiſted.

The plaintiff was then nonſuited, with leave to move to ſet the nonſuit aſide.

HENRY MILLER *v.* JOHN PROBST.

1797. THIS was an action of debt, for the duty on two ſtills had, owned, and employed by the defendant, on 30th *June*, 1795, for one year then paſt.

There were ſeparate certificates of the entry of two ſtills for the year 1794-5, dated 12th *December*, 1794; and annexed to one of the certificates was the following note, ſigned by *John Probst*:—"Due for the laſt year's arrearages 45 dollars and 68 cents, on both ſtills taken together."

Young, for the defendant, urged, that *John Probst* had not the ſtills, in the preceding year; and that the plaintiff cannot recover unleſs proof be made, that he had the ſtills within that year. Where no conſideration is ſtated or proved, the promiſe, except in mercantile tranſactions, is not binding.

* *Eſt.* 94.

PRESIDENT. Although *John Probst* had not the ſtills, another might have had and worked them, in 1793-4; and the duty was then a lien on the ſtills. To relieve his ſtills from this liability, *Probst* might have undertaken to pay the duty. This ſeems to be the reſult of a ſettlement of an account between the parties, when all circumſtances may be ſuppoſed to have been underſtood, and a balance ſtruck. The note is *prima facie* evidence of a demand on *Probst*. He may controvert it, by ſhewing fraud, want of conſideration, &c.

† *U.S. L.* 96.

There was a verdict for the plaintiff.

FAYETTE COUNTY.

September Term, 1797.

WILLIAM DEHART *v.* JEREMIAH GARD.

AN action of debt on a bond of 82*l.* proclamation money of *New-Jerſey*, dated 21ſt *November*, 1775, conditioned for the payment of 41*l.* 5*s.* 4*d.* with intereſt from the date, was brought to *December* term, 1793.

1797.

There was an indorſement, without date of a credit of 7*l.* light money. The parties both lived in *New-Jerſey*, at the date of the bond; but immediately afterwards, the defendant removed to this country.

Simonſon, for the defendant, relied on the preſumption of payment, from length of time, and ſome light circumſtances 1 *Burr.* 434. *Cowp.* 109.

Young, for the plaintiff, oppoſed to this the intervening war, and the defendant's removal to this country. 1 *T. Rep.* 270.

PRESIDENT. The opinion of juſtice *Buller*, in the caſe of *Oſwald v. Legh*, ſeems to ſet the law on this ſubject on proper grounds. That was a far ſtronger caſe than this. This is a bond of but eighteen years ſtanding. A war of eight years had juſt commenced before the date of the bond, and ſeemed ſoon to deſtroy all property, confidence, and credit. Paper money rendered it dangerous for any creditor to demand a debt. The defendant left *New-Jerſey* immediately after. The preſumption ought to be ſtrong indeed, to counteract all theſe circumſtances. 1 *T. Rep.* 270.

Verdict for the plaintiff for 81*l.* 11*s.* 4*d.*

PENNSYLVANIA *v.* JOHN OLIPHANT and ANDREW OLIPHANT.

INDICTMENT for a nuiſance in obſtructing a water-courſe, ſo as to overflow an high way.

The obſtruction was a dam for a forge. It did not appear, that the road had ever been laid out by any authority.

Young, for the defendants, objected to going into any evidence, until a copy of the order of the court of Quarter Seſſions, confirming the road, ſhould be produced.

Galbraith, for the ſtate, gave up the proſecution, and aſſented to a verdict of acquittal.

ANDREW HUSTON *v.* ROBERT AYRES CLERK.

1797. THE plaintiff declared for 50*l.* as a penalty for marrying his daughter, *without having a certificate of his conſent.*

PRESIDENT ſuggeſted, that the 1ſt ſection of the act of aſſembly, which requires *a certificate of conſent*, previous to the publication of a marriage, has no penalty annexed to it; and that the 2d ſection impoſes the penalty of 50*l.* for joining in marriage, *without publication.*

It was agreed, that the defendant ſhould pay the coſts, and the plaintiff wave all further proceedings.

ISAAC MEASON *v.* SAMUEL PHILIPS.

BY articles of leaſe between them dated 30th *January*, 1793, *Meaſon* leaſed land to *Philips* for four years, at twelve ſhillings and ſixpence *per* acre, which *Philips* covenanted to pay in good merchantable grain, wheat, at four ſhillings, rye, at three ſhillings, and corn, at two ſhillings and ſixpence *per* buſhel. And on this engagement *Meaſon* brought an action of covenant.

On the ſide of *Philips*, it was contended, that the damages ſhould be aſcertained by valuing the grain at the prices mentioned in the article. On the ſide of *Meaſon*, it was contended, that the damages ſhould be aſcertained by the current prices of the grain, at the time of delivery.

PRESIDENT. *Philips* has bound himſelf to deliver grain; and *Meaſon* to receive this grain at certain prices. Grain, not money, was the object in the view of both; and money was only uſed to aſcertain the quantity of grain. The chance of gain or loſs muſt be mutual.—If grain had fallen in value, *Philips* would have gained; for if he had tendered grain, *Meaſon* could not have required money. If money has fallen in value or, in other words, if grain has riſen in value, *Meaſon* muſt gain; for a tender of money does not excuſe from the covenant to deliver grain. The damages therefore ought to be

ascertained by valuing the grain at the current prices, at the time of delivery, with interest from that time. 1797.

The jury found accordingly; but not at the rate of the grain which had risen most. Probably they took the price of a part of each kind of grain.

NOTE.—Three other cases, one in the court of Common Pleas of *Washington* county, another in *Fayette* county, and the third in *Allegheny* county, have since been tried, and decided on the same principle, of giving, in damages, the increased value of the grain, with interest from the time of delivery.

WESTMORELAND COUNTY.

March Term, 1798.

THOMAS GRIER *v.* PATRICK COWAN.

THIS was an action of replevin for sundry articles taken in distress for rent. By the article of lease for three years, it appeared that the tenant was to pay no rent the first year, provided he put the dwelling-house in such order, as will make it convenient for his purpose, and that the rent for the other two years was to be 30*l.* *per annum*, in half yearly payments. The rent, for the two last years, was paid; and the distress was made for rent for the first year. Some evidence of repairs was given.

It was suggested, from the bench, that no definite rent for the first year being stipulated; but a kind of personal obligation of repairs convenient for the lessee imposed, and the value of the repairs either made or intended being uncertain; the landlord could not know for what amount to distrain, nor the tenant what sum to tender to relieve his goods. *Co. Lit.* 96. 1 *Wils.* 107. 2 *Str.* 1238.

The defendant's counsel gave up the right of distraining; but the plaintiff's counsel insisted on proceeding for damages, and got a verdict for 20 dollars.

FAYETTE COUNTY,

March Term, 1798.

Leſſee of WILLIAM and JOHN LEE, *v.* PATRICK TIERNAN.

1798. EJECTMENT for four lots in the town of *Brownſville*.—

Simonſon, for the plaintiff, ſhewed a receipt from *Thomas Brown*, the proprietor who laid out the town, dated 1ſt *October*, 1786, for 30*l.* paid by *Thomas Neily*, in full for four lots, (the lots in diſpute) and engaging to make a title when requeſted.

On a judgment confeſſed by *Neily*, 28th *December*, 1787, for 790*l.* 13. 6. to *William* and *John Lee*; a writ of *fieri facias* iſſued, *tested* 28th *September*, 1788, returnable to *December* term, 1788, for real debt 395*l.* 6*s.* 9*d.* with intereſt and coſts. On this execution, theſe lots (with a tract of land) were levied and condemned; and, on 28th *July*, 1789, (on a writ of *venditioni exponas*, returnable to *September* term, 1789) the lots were ſold to *William* and *John Lee*, for 12*l.* And, on 22d *September*, 1789, the ſheriff acknowledged a deed to *William* and *John Lee* for the lots thus ſold.

Brackenridge and *Campbell*, for the defendant, ſhewed a conveyance by *Brown* to *Matthew* and *William Vanlear*, of theſe four lots, dated 29th *June*, 1789, in conſideration of 46*l.* and of ſundry covenants therein mentioned; and a conveyance of the ſame lots from *Matthew* and *William Vanlear*, for 30*l.* to the defendant *Tiernan*, dated 28th *January*, 1792.

It was proved, that, in 1787, it was underſtood generally, that theſe lots were the property of *Neily*, and had been incloſed by him; but they were in the poſſeſſion, or in the care, of one *Campbell*. *Tiernan* then lived in *Maryland*, and did not come into *Pennſylvania*, till in the ſpring of 1790; and there was no reaſon to believe, that he knew any thing of *Brown's* ſale to *Neily*, or of the ſubſequent tranſactions. In 1789, *William Vanlear*, who was a creditor of *Neily's*, ſaid he had an order from *Neily* on *Brown*, to convey theſe lots to him.

Brackenridge, for the defendant, reſted on the want of notice to *Tiernan* of any claim to theſe lots, other than that which was conveyed to him; and on the principle, that a purchaſer without notice will hold his title. 1798. 1 *Fonbl.* 151-3

Simonſon, for the plaintiff. *Brown* had no right to convey to *Vanlear*. He was a truſtee for *Neily*; and, previouſly to the conveyance to *Vanlear*, the lots were levied for *William* and *John Lee*, and afterwards ſold to them.

PRESIDENT. From the date of the receipt, *Brown* was a truſtee for *Neily*, and every ſubſequent purchaſer with notice, was, like *Brown*, a truſtee. But, whenever the title to the lots came, by regular conveyance into the hands of a *bona fide* purchaſer, without notice, for a valuable conſideration, he muſt hold it, diſcharged of the truſt.

Vanlear purchaſed with notice of the truſt. He claimed under the truſt. His right to this claim under the truſt we have not ſeen. Whatever it was, by this claim, he ſeems to have got a conveyance from *Brown*. And this title to theſe lots he conveyed to *Tiernan*. But no notice of the truſt has been brought home to *Tiernan*, a regular *bona fide* purchaſer, for a valuable conſideration, and (as no notice has been proved) without notice.

The levy and ſale on a judgment not againſt *Brown* or *Vanlear*, but againſt *Neily*, could not be notice to *Tiernan*, who derived his title through *Vanlear* and *Brown* only. For, in the examination of the chain of title, it was not neceſſary, and could not be required, that *Tiernan* ſhould examine any records againſt *Neily*.

Tiernan then, being a *bona fide* purchaſer, without notice, and for a valuable conſideration, and having a legal title; this legal title remains in him diſcharged of the truſt. And there muſt, therefore, be a verdict for the defendant.

The jury found accordingly a verdict for the defendant.

WASHINGTON COUNTY.

April Term, 1798.

JOSEPH CREACRAFT and wife *v.* BENJAMIN WIONS.

1798. *CREACRAFT*, having married the widow of *Jabez Baldwin*, ſued for her dower of one third of 399 acres of land. A ſatisfaction and acceptance under the will was ſet up as a bar to this claim.

By his will, dated 10th *September*, 1778, *Jabez Baldwin* gave to his wife, now the wife of *Creacraft*, one third part of all his moveable eſtate, together with the uſe of one third of his lands, while ſhe remained his widow, and alſo one cow over and above her thirds; and gave all the reſt of his eſtate to his children.

Annexed to the will, and of the ſame date, was a note ſigned by his wife, ſtating that ſhe voluntarily agreed to the above will. And, on 4th *March*, 1791, her then huſband *Joſeph Creacraft* gave a receipt, to *Caleb Baldwin*, one of the executors, for a cow over her third part, agreeably to the will of *Jabez Baldwin*.

It was proved, by the perſon who drew the will, that *J. Baldwin* and his wife talked together about the will, and that he drew it according to their directions; that he told *J. Baldwin*, that this was no more than the law would give her; that *J. Baldwin* then deſired him to put in a cow beſides the thirds; that ſhe declared herſelf well ſatisfied, and, after his death, deſired the executors to prove the will, and ſaid, though ſhe knew ſhe could have her thirds, ſhe did not want more than her huſband had given her, nor to hurt the children; for her mother had done ſo and got a great eſtate, and ruined the children; and that, when the property was appraiſed, ſhe choſe and took a cow, as the one given her by will, and declared herſelf ſatisfied.

Jabez Baldwin left eight children, and a perſonal eſtate of 295*l.*

Campbell, for the plaintiffs. Whether the deviſe was intended to be in lieu of dower, muſt be aſcertained from the will itſelf, and not from parole teſtimony. Dower is not barred by a collateral recompence, which will not be preſumed to be in lieu of dower, but a benevolence.

Kennedy vs. Nedrow, Dall. 415.

Brackenridge, for the defendant. All the circumſtances taken together ſhew a clear intention of the teſtator, that the deviſe ſhould be in lieu of dower. It is not neceſſary, that this intention be expreſſed, if it be ſufficiently implied. The deviſe has been accepted as a ſatisfaction, and is a complete bar to a claim of dower. 1798. *Ambler*. 464, 682, 730.

PRESIDENT. It is perhaps not ſo difficult to gueſs what the intention of the teſtator was, as to decide, that this intention is ſufficiently expreſſed in the will, whence only it can be collected.

If this deviſe was intended in lieu of dower, the widow of *Jabez Baldwin* has been very little favoured by the will. All that ſhe has got by the will, ſhe would have got without it, except one cow; and, for that, her eſtate, which would have been during her life, is reſtrained to her widowhood, and determined by her marriage.

If a deviſe be given in lieu of dower, the widow may elect either, but cannot have both; and if ſhe accept one, ſhe is barred of the other. 4 *Co.* 1. *Hargr. Co. Lit.* 36. *b.* n. 6, 7. 1 *Eq. Ca. Ab.* 218-9.

But, unleſs it appear from the will, that the deviſe was in lieu of dower, the deviſe ſhall be conſidered as a benevolence; and the widow ſhall have both it and her dower. 1 *Bro. Parl. Ca.* 538. 1 *Bro. Parl. Ca.* 591.—2 *Atk.* 427.—3 *Atk.* 8, 436. 2 *Wms.* 616.

But it is not neceſſary, that it ſhould appear from expreſs words of the will, that the deviſe is in lieu of dower; it is enough, that this intention be implied, and ſeem neceſſary to give effect to the will. 7.—1 *Vern.* 356.--2 *Vern.* 365.—*Dall.* 415.

If the legacy and deviſe be *inſtead* of dower, the widow is barred by her acceptance; but if *together with* dower, ſhe is not barred. *Ambl.* 464, 682, 730.

There is no expreſs declaration in this will, that the deviſe and legacy ſhould be in lieu of dower; and, unleſs this intention be implied, the plaintiffs muſt recover.

The only ground for ſuch an implication in the will ſeems to be this, that, except the legacy and deviſe, *all the reſt of his eſtate* is given to his children, and ſo nothing is left for dower,

The jury found a verdict for the defendant.

NOTE.—There were three ſuits againſt three tenants. One had been tried before; there was a verdict for the defendant, and a motion for a new trial, poſtponed for the trial of this. It was recommended to remove the third

1798. into the Supreme court. This was done; and, in the mean time, no judgment was given, on either of the verdicts.

4 St. L. 155. The act of assembly, of 4th *April*, 1797, has settled it, in future, that a devise shall be in lieu of dower, unless otherwise declared.

ALLEGHENY COUNTY,

June Term, 1798.

PENNSYLVANIA *v.* JOHN LEACH, WILLIAM LEACH, THOMAS LEACH, and WILLIAM M'LURGH.

THIS was an indictment for a forcible Entry, on 28th *February* last, on a tract of land in possession of *George Konkle*

Konkle had bought an old improvement, where there were trees deadened, and potatoes planted. He built a cabbin partly of logs lying cut, and partly of logs cut by him at that time. The *Leaches* had deadened some trees, and cleared some ground on this land. They threw down *Konkle's* cabbin, and built another with the logs of it in another place. *M'Lurgh* assisted them in building this other cabbin. Neither *Konkle* nor *Leach* lived then on the land. *Konkle* lived with his family on another tract of land, which he had bought, two or three miles from this; he was himself generally in this cabbin with some of his goods; and the evening before the *Leaches* pulled down his cabbin, he had gone home, to sell meat to one who wanted it from him; but went unwillingly, for fear that the *Leaches* should go into his cabbin, while he was absent. When he returned next day, he found them pulling down his cabbin. *J. Leach*, with a gun in his hand, told *Konkle*, he must not work more there. While he was taking away some of his clapboards, to make a temporary shelter for his family, *J. Leach* came up to him, and shook him by the breast. One said, "strike him;" *T. Leach* said, "Don't strike

him;" *M'Clurg* ſaid nothing. *W. Leach* threw him againſt a log. Afterwards he went back, when the *Leaches* were not there, built another cabbin cloſe to the door of that which the *Leaches* had built of the logs of his firſt, brought his family there, and lived in it. While he was making a fence, *J. Leach* threw him down, and threw down his fence, on which his wife was ſitting. He deſiſted. The *Leaches* took the rails which he had made, fenced and cultivated ground, which he had begun to clear, before he brought his family there. He went and cleared in another place. Both he and they occupy cleared ground on this tract, and have grain growing on it. 1798.

Collins and *Campbell*, for the defendants, propoſed, that *M'Clurg*, as they ſaid no proof of force by him had been given, ſhould be examined as a witneſs. *Gilb. L. of Ev.* 134.

Woods, for the proſecutor. All who accompany the perſon uſing the force are guilty. It has been proved, that *M'Clurg* was preſent and aſſiſting to build, into a cabbin for *Leach*, the logs which had been thrown down from the cabbin of *Konkle*. Whether there be ſuch a poſſeſſion, as will be protected againſt a forcible entry is a queſtion of fact. If there be any teſtimony, though not enough to convict, in the judge's opinion, ſuch perſon can be no witneſs: for his guilt or innocence muſt wait the event of a verdict; and a jury, of their own knowledge may have farther light in the fact, than what they hear from the witneſſes in court. *Gilb. L. of Ev.* 134-5.

PRESIDENT. Whether, if there be evidence of poſſeſſion, that evidence be true, is a queſtion of fact to be determined by the jury. But admitting the teſtimony as true, whether there be ſuch poſſeſſion proved as will be protected againſt a forcible entry, is a queſtion of law to be determined by the court. I lay no ſtreſs on any knowledge which the jury may have, not drawn from evidence given before the court. This would deſtroy all principles, and render it impoſſible for courts to give new trials. If any juror has knowledge of facts not given in evidence, he ought to declare it, and be ſworn as a witneſs. If circumſtances be proved, from which it is poſſible for the jury to preſume facts amounting to guilt, the perſon againſt whom thoſe cir-

1798. cumſtances have been proved cannot be received as a witneſs.

The cabbin built by *Konkle* does not ſeem to have been his *home*. His *home*, his houſe and his family were two miles from this place. But while he was in it, or on the land, it was a temporary home, and, as ſuch, while ſo occupied, it is protected againſt force. Proof of force, and of an entry by force has been made. And, if this force was exerted, while he was in the houſe, or on the land, there is an offence. The guilt or innocence, therefore, turns on this queſtion; was *Konkle* in the houſe, or on the land, when *Leach* made this entry? This is a queſtion of fact, and, however improbable, we are not the judges of its probability or improbability; ſince there are circumſtances from which the jury may preſume it. Therefore, though, the proſecutor being a competent witneſs, we might lean to the admiſſion of this defendant, as a mean of producing an elucidation of the facts; we do not feel ourſelves at liberty to admit *M'Clurgh* to give evidence on this trial.

Collins then offered in evidence a warrant for this land, and a ſurvey of it made on this warrant.

Woods. No right will authoriſe an entry by force, on the poſſeſſion of another. If there was no poſſeſſion in another, there is no offence.

Collins. I offer the warrant and ſurvey, to ſhew that *Leach* had a right, under the act of aſſembly, to make an entry in order to make a ſettlement.

PRESIDENT. The warrant and ſurvey gave a right to enter, and make the ſettlement. But the entry muſt be peaceable. If a previous poſſeſſion be taken, and will not be abandoned from the influence of perſuaſion, force muſt not be uſed. The perſon having the right by warrant to enter, if prevented from making his ſettlement, by the poſſeſſion of another, whom he cannot remove without committing an offence, cannot, from ſuch failure, be ſuppoſed to loſe his right.

This would ſeem to me to be the true doctrine, on general principles. Whether the peculiar nature of the act of aſſembly, under which theſe ſettlements are made, ought to diſtinguiſh caſes under it from other caſes, may perhaps be made a ſubject of diſcuſſion. It may perhaps be contended, that one who has a warrant, and has done,

or caufed to be done, fome work on the land claimed by this warrant; if, while the perfon employed in making fuch fettlement, is occafionally abfent, another comes on the land; may turn this other off by force. On this I fay nothing. 1798.

But may not one having made a furvey on a warrant, give in evidence this furvey, not as eftabliſhing a right, but as circumfcribing the bounds of his poſſeſſion?

It was then admitted, that *Leach* had a warrant and furvey, and that *Konkle* was within this furvey.

It was proved, for the defendants, that in fpring 1797 (the two cabbins were then built) *Konkle* being aſked who cleared a certain field, ſaid, *John Leach* had cleared it; and that he ſaid, he had once given up that land.

Collins and *Campbell*. *Konkle* was not in poſſeſſion, when the *Leaches* entered and built their cabbin with the logs of his. *Konkle* abandoned his poſſeſſion; and *Leach* was working on this land, when *Konkle* returned.—*Leach* has a furvey; *Konkle* has none. *Leach* has not ouſted *Konkle* of any land of which he was poſſeſſed. He yet occupies his houſe and his fields. As to any land now in the poſſeſſion of *Leach*, you have no evidence of its having been in the poſſeſſion of *Konkle*, but from his own teſtimony; and he is a competent witneſs only as to the force.

Woods. It is not neceſſary, in order to make a forcible entry an offence, that there ſhould be any perſon reſiding on the land. Breaking open a dwelling-houſe, whether any perſon be in it or not, is indictable as a forcible entry. 2 *Hawk.* 220.

PRESIDENT. I think that muſt be underſtood of a dwelling-houſe on premiſes of which ſome perſon is in poſſeſſion. Having only cattle on the land has been conſidered as not being in poſſeſſion. And the reaſon aſſigned is, becauſe they are not like ſervants capable of being ſubſtituted as agents, and therefore their reſiding upon the land continues no poſſeſſion. 2 *Burn, J.* 179.—2 *Bac. Abr.* 558.

The jury found the defendants guilty.

WASHINGTON COUNTY,

Auguſt Term, 1798.

Leſſee of DANIEL DIMOND *v.* DAVID ENOCH.

1798. EJECTMENT for 230 acres of land, of *July* term, 1797.

On 3d *October*, 1786, *James Fitzpatrick* conveyed in fee ſimple an improvement and 230 acres of land (the premiſes in queſtion) to *David Enoch*; who gave a bond, of the ſame date, to *Fitzpatrick*, in 252*l.* 8*s.* conditioned, that, if *Fitzpatrick* pay or tender 126*l.* 4*s.* on or before 1ſt *March* then next enſuing, *Enoch* will reconvey the tract of land that day conveyed. On 1ſt *June*, 1788, this bond was aſſigned to *Daniel Dimond*, who had bought the land from *Fitzpatrick* for 200*l.* as appeared by an article of the ſale, dated 29th *December*, 1786, by which he bound himſelf to pay 126*l.* on the 1ſt *March* then next enſuing. About the year 1789 or 1790, *Dimond* went to *Enoch*, and propoſed to take or give ſatisfaction. *Enoch* declined both. In ſpring, 1797, *Dimond* tendered upwards of 530 dollars to *Enoch*, who refuſed to receive it.

Fitzpatrick had bought the land from one *Bozier*; and a bond of *Fitzpatrick* to *Bozier*, for the payment of 126*l.* 4*s.* with intereſt due on it, part or all (it did not appear which) of the conſideration money, had been transferred to *Enoch*. *Fitzpatrick*, not being able to pay the money, executed the conveyance, dated 3d *October*, 1786, to *Enoch*, and took from him the bond of that date. As good or better land, in that part of the country, has been ſold ſince, at twelve ſhillings and ſixpence *per* acre. *Enoch* was not to take poſſeſſion of the land, till after default of payment by *Fitzpatrick*, on 1ſt *March*, 1787. A few days after that, he had the land ſurveyed on a warrant which he purchaſed for it. *Fitzpatrick* was preſent and made no oppoſition, and did not ſay, that he had transferred his intereſt in the land. *Enoch* has continued in poſſeſſion, and made improvements.

There was no evidence of any ſpecific converſation or agreement, between *Enoch* and *Fitzpatrick*, at the time the conveyance was made in *October*, 1786. One witneſs ſaid, he underſtood it as a mortgage; another ſaid, he underſtood, that, if *Fitzpatrick* paid the money, at the time mentioned in the bond, the land was to be reconveyed to him. But, if he did not, that *Enoch* would hold it by the conveyance. 1798.

Simonſon, for the defendant, offered to ſhew a warrant for the land, in the name of another perſon, at the time that the conveyance and bond were executed in *October*, 1786; and, urging that a defendant may claim under any title, ſtated, that, here, there was an adverſe title, at the time, and that *Fitzpatrick* impoſed on *Enoch*, and gave him a ſecurity, to which he had no right.

Campbell objected to this, that the defendant having come into poſſeſſion under a deed which he accepted from the plaintiff; cannot now diſpute the plaintiff's title. In an ejectment on a ſheriff's ſale, the debtor cannot ſet up a title from another perſon. It was ſo determined at *Niſi Prius*, in *Allegheny* county, laſt *May*, in the caſe of *Baldwin v. Bently*.

PRESIDENT. If a man take a leaſe from another, can he ſet up an adverſe title, to bar an ejectment, or a claim for rent, by the leſſor? We reject the teſtimony; but, if inſiſted on, the point may be reſerved, though I ſee no difficulty in it.

Simonſon. A covenant for the benefit of the covenantor, muſt be ſtrictly complied with. All covenants muſt be taken according to the intent of the parties.

Lyon, for the plaintiff. This is a mortgage. And, the money, with intereſt, having been tendered, the title of the mortgage is extinguiſhed.

PRESIDENT. A conveyance may be conſidered as a mortgage, though the defeazance be on a ſeparate paper. We have not ſufficient evidence, on which to found an opinion how this tranſaction ought to be conſidered. *3 Bac. Abr.* 634.—*2 Com. Di.* 299.

But I do not think, that we ought to ſtrain hard, to conſtrue a tranſaction of this kind as a mortgage. If, without violating any rule of law, we can conſider it as the parties intended, we ought to do ſo. It may be conſidered as a conveyance on a certain condition, the default

1798. of payment on the day. Each party may have wiſhed to avoid the coſts and trouble of a ſuit on a mortgage. *Fitzpatrick* may be ſuppoſed to ſay, "Give me five months to pay the money without intereſt, and, if I do not, the land ſhall be yours;' and *Enoch* to ſay 'I agree.'

Suppoſe it a mortgage with poſſeſſion; caſes might exiſt, in which a tender of only the debt and intereſt ought not to extinguiſh the eſtate. A man going into poſſeſſion under a contract is not as a treſpaſſer. May he not have a claim for neceſſary or proper repairs or improvements? Or muſt he abſtain from them, on the mere *poſſibility* of the other performing the condition? —Was *Enoch* to have nothing for his warrant and ſurvey?

I lay not much ſtreſs on the converſation (for it ſeems to be nothing more) between *Dimond* and *Enoch* in the year 1789 or 1790. No ſpecific propoſition appears to have been made; but only a trial whether *Enoch* was willing to depart from his contract with *Fitzpatrick*, and allow *Dimond* ſomething for his *ſpeculation*. No tender was made till 1797, ten years after the condition ought to have been performed. This ſeems to be unreaſonable negligence. While it was doubtful whether the land was worth more than the money, *Dimond* ſeems to have been very inactive or indifferent. When an extraordinary riſe in the value of land happened; he preſſes for the land.

If the plaintiff's counſel think this *muſt* be conſtrued as a mortgage, they may move for a new trial. For I have ſaid that it *may* be conſtrued otherwiſe.

Verdict for the defendant.

ALLEGHENY COUNTY.

September Term, 1798.

Leſſee of WILLIAM CECIL *v.* JAMES AMBERSON.

EJECTMENT for 400 acres of land weſt of the *Allegheny* river. 1798.

Cecil and *Amberſon* claimed by ſettlement, under the law of 1792. Each had a cabbin built at the diſtance of three or four hundred yards from each other. Both applied to the ſurveyor of the diſtrict to ſurvey for them in ſpring, 1794. While the ſurveyor was executing the ſurvey, and came to where *Cecil* thought he was going on the diſputed land, *Cecil* told *Amberſon*, he was incroaching on him; *Amberſon* ſaid, he could take his cabbin, and a piece of bottom below it. *Cecil* ſaid he was intitled to a *ſurvey*, and requeſted the ſurveyor to interfere, and get *Amberſon* to leave him a piece of land, and not take in his cabbin. *Amberſon* agreed to make a line, and both agreed on a courſe. *Cecil* carried the chain, and, after proceeding ſome diſtance on the courſe, threw it down, and ſaid, he would not agree to it, for it went too near his houſe. The ſurveyor ſaid they had agreed on the courſe, and he would not alter it. The ſurveyor then ſurveyed *Cecil's* tract. *Amberſon* had 308 acres.—*Cecil* not 240. The diviſion line was within about 30 perches of *Cecil's* houſe.

Brackenridge, for the plaintiff, offered a private ſurvey made by *Cecil* in 1797.

Semple, for the defendant, objected to this.

PRESIDENT. A ſurvey having been made by the public officer, at the requeſt, and in the preſence of both parties; a ſubſequent private ſurvey cannot be received. The plaintiff ought to have applied for a *re-ſurvey*.

ALLEGHENY COUNTY,

December Term, 1798.

JOSEPH MARSHAL *v.* JAMES SPROTT.

1798. THIS was an action of *indebitatus aſſumſit*, for money had and received.

3 *St. L.* 209. When the law of 3d *April*, 1792, opened the Land-Office for the diſpoſition of land weſt of the *Allegheny* river, many ſuppoſed, that each perſon had a right to appropriate to himſelf, by ſettlement only, as well as by warrant, as many tracts of land as he could procure to be ſettled. This principle, taken as certain, was immoderately abuſed. And a great number of tracts were ſo claimed by each of many individuals, by means of trifling cabbins, deadenings, &c. which they called *improvements*; but which had no kind of reſemblance to

2 *St. L.* 488. what the law intended, "an actual perſonal reſident ſettlement, with a manifeſt intention of making it a place of abode, and the means of ſupporting a family."[3]

Of theſe the defendant ſeems to have been one, and, by ſuch improvements, claimed ſeveral tracts, which he propoſed to ſell to ſettlers. Two hundred acres, the half of one of his tracts ſo claimed, he ſold to the plaintiff, for 200 dollars, by an article dated 24th *February*, 1797, binding the plaintiff to clear ten acres, and reſide on the land five years. This ſettlement and reſidence would have intitled the ſettler, and, as *Sprott* conceived, would have intitled him, under the law, on the payment of the purchaſe money, to a patent for 400 acres.

In *April*, 1797, *Marſhal*, going to ſettle on this land, found one *Lowry*, with his family, reſiding there; who, having raiſed a crop of corn there, the year before, claimed a tract of 400 acres. There were other ſettlers round, and there was no reaſon to believe, that *Lowry* could have more land to his ſettlement, out of their boundaries, than 400 acres. In *February*, 1797, one *Willis* had applied to *Sprott* for the land. *Sprott* told him, he had promiſed it to *Marſhal*, the fall before, and

if he ſtood to his bargain, he would not give it to another. They went to *Marſhal*, and he ſtood to his bargain, and paid *Sprott* part of the money. There was no evidence, that *Marſhal* knew any adverſe poſſeſſion. 1798.

Brackenridge, for the defendant, offered to prove a parole contract previous to the article.

PRESIDENT. The parties have reduced all their previous negotiation to the points ſtated in the article.—There is no ſuggeſtion of fraud.

Brackenridge then called a brother of the defendant, to prove, that, at the time of the payment of the money, *Sprott* offered to *Marſhal*, to give up the bargain, and demand no money, if he relinquiſhed his claim to the land.

Semple, for the plaintiff, objected to this teſtimony, and ſtated, that *Sprott* had brought an action againſt *Marſhal* on the article.

PRESIDENT. If an action be brought on the covenant, *Sprott* can recover damages for any default of *Marſhal*. *Marſhal*, having no knowledge of any adverſe poſſeſſion, went to make a ſettlement according to his article. He found another in poſſeſſion, and could not proceed to make his ſettlement, without taking poſſeſſion by force, (which would have been an offence) or proſecuting an ejectment. He was not obliged to do this; but, in ſuch a caſe, had a right to ſay, that the bargain, from this material defect, an adverſe poſſeſſion, became void, and he had a right to demand back his money. The defendant ſeems to have been conſcious of this, and propoſed to do preciſely the ſame thing. I can ſee no uſe in the evidence offered. But, if the defendant's counſel think otherwiſe, we will reſerve the point.

There was a verdict for the plaintiff.

WESTMORELAND COUNTY.

December Term, 1798.

Leſſee of the Executors of THEODORUS BROWERS,
v. FRANCISCUS FROMM.

1798. BROWERS was a *German* catholic prieſt, who after a reſidence in a *Daniſh West-India* iſland, had, a few years before his death removed into *Pennſylvania*, and ſuperintended a catholic congregation near *Greensburgh* in *Weſtmoreland* county, and owned two plantations there; which, by his will, dated 24th *October*, 1790, he deviſed as follows:—"To a Roman Catholic prieſt that ſhall ſucceed me in this ſaid place, to be entailed to him, and his ſucceſſors, in truſt, and ſo left by him who ſhall ſucceed me to his ſucceſſors, and ſo in truſt and for the uſe herein mentioned in ſucceſſion forever. And that the ſaid prieſt for the time being ſhall ſtrictly and faithfully ſay four maſſes, each and every year forever, *viz.* one for the ſoul of the Reverend *Theodorus Browers*, on the day of his death, in each and every year forever, and three others, the following days in each year as aforeſaid, at the requeſt of the Reverend *Theodorus Browers*. And further it is my will, that the prieſt for the time being ſhall tranſmit the land ſo left him in truſt as aforeſaid to his ſucceſſor, clear of all incumbrances, as aforeſaid."

The will directed the payment of debts and funeral expences, and the erection of a tombſtone on the grave of the teſtator on the premiſes. The ejectment was brought for the land thus deviſed.

The defendant, a native of *Germany*, was there ordained a Catholic prieſt, in 1773, and officiated, in that capacity, in various parts of *Germany*. In *February*, 1789, intending to remove to *America*, he obtained from the vicar of the archbiſhop of *Mentz*, a commendatory certificate of miſſion to *America*, as to a country in which there was no biſhop. The Reverend Dr. *John Carrol* of *Maryland*, having been elected by the Roman Catholic clergy of *America*, was, by a bull of the preſent *Pope*

Pius VI. dated 6th *November*, 1789, conſtituted biſhop of *Baltimore*, with juriſdiction over all the Catholic church within the *United States*, to be ſuffragan to no metropolitan, and ſubject only to the Apoſtolic See.— After *Fromm* had landed in *America*, he applied to biſhop *Carrol*, received pecuniary aſſiſtance from him, and was employed to officiate as a prieſt for ſome time, in the counties of *York* and *Lancaster* in *Pennſylvania*. Hearing of the deviſe and death of *Browers*, he removed to *Weſtmoreland* county, and, of his own authority, took poſſeſſion of his houſe and the lands; and, 2d *July*, 1791, drew up and ſigned a writing reciting the manner of his taking poſſeſſion, as under the will, and procured the executors to ſign a certificate of their aſſent annexed to this writing. On the 7th of *Auguſt*, 1791, he wrote to biſhop *Carrol* ſtating, that, as he underſtood, he had not received him among his clergy, but abandoned him, he had gone near to *Greenſburgh*, and taken poſſeſſion of the plantation of *Browers*, and been choſen by his congregation, where he would ſtay till he could acquire money to pay his debts, and his paſſage to his own country, and requeſting the biſhop's conſent to his election as prieſt of *Browers's* congregation. 1798.

After *Fromm* had thus got poſſeſſion of the eſtate of *Browers*, the congregation began to doubt his authority, and wanted to turn him off. In *April*, 1794, he entered into a written agreement with the congregation, to officiate as prieſt among them, for one year, in conſideration of certain ſums to be paid by the individual members of the congregation; and to obtain authority from the biſhop of *Baltimore*, for this purpoſe; or, if the biſhop ſhould refuſe authority, then to give up his poſſeſſion of the eſtate. This agreement he ſigned, adding to his name "*Prieſt of Unity congregation for one year.*" Not procuring authority from the biſhop, he determined to keep poſſeſſion of the eſtate under the will, on the terms of ſaying maſſes. But conceiving that his agreement would injure his claim, he contrived to get hold of it, under pretence of collecting his ſubſcription money, and, having done this, he pocketed the agreement, as it lay on the table, where the ſubſcribers were paying him his money; and, when they remonſtrated againſt this, he tore his name from it, ſaying, "I am no more

1798. your prieſt, nor you my congregation;" refuſed to give it up; and perſiſted in retaining poſſeſſion of the eſtate.

A certificate of the biſhop of *Baltimore*, dated 5th *Auguſt*, 1795, was produced, ſtating, that by the rules of the Catholic church, no prieſt can exerciſe his miniſtry within the juriſdiction of any biſhop, without authority from that biſhop; nor leave his congregation, and exerciſe his miniſtry in another, without ſuch authority; that *Fromm* never had any authority from him to exerciſe any ſpiritual miniſtry near the place of his reſidence, and, having exerciſed it, was interdicted, and, perſiſting, is ſuſpended.

A certificate was alſo produced from the vicar general of the archbiſhop of *Mentz*, under the ſeal of his archi-epiſcopal ſee, dated 8th *May*, 1797, ſtating, that *Fromm* is a prieſt capable of ſucceeding to the eſtate of *Browers*; that prieſts may obtain miſſion, from any biſhop, to adminiſter the ſacraments, and enjoy all rights of prieſts, in thoſe places where there is no biſhop; that bulls muſt be promulgated in due manner; that the ſacrament of the maſs may be validly celebrated by any prieſt, whether a pariſh prieſt or not, although this be interdicted to the prieſt, by the biſhop, and though, by its celebration, the prieſt acts illegally; and that, if maſſes of this kind be founded, by ſuch celebration, the foundation and obligation may be validly ſatisfied.

Brackenridge, for the defendant, made eight points.

1. The executors had no authority to leaſe, or make any ſuch agreement, as they made with *Fromm*, in *April*, 1794. If they had any authority, it was to put in poſſeſſion for life; and having done ſo, in *July*, 1791, their power expired; and, after that, the prieſt ſo put in poſſeſſion, is, by the will, to leave it to his ſucceſſor.

2. Executors have *no* authority over the real eſtate, unleſs given by the will. This will gives none.

3. If they had any authority, they have executed it.

Corp. Jur. Can. Extrav. Com. L. 1. tit. 3. c. un. Bonif. 4. By the rules of the Catholic church, bulls muſt be promulgated in certain forms. The bull conſtituting the biſhop of *Baltimore* has not been in due form promulgated.

2 Sebram. Inſt. Jur. Ec. 153. 5. The authority of the biſhop extends only to the perſon. He has no authority over a private eſtate.—There is a difference between a benefice connected with

the care of ſouls, and a benefice connected with a ſpecial ſervice. The antient *Britiſh* church was a ſtranger to papal authority; and laws were made to reſtrain appeals to it. Even where there is a right, it may be left without a remedy by the claimant's negligence permitting a lapſe of time. The canon law fortifies a colourable poſſeſſion, the enjoyment of which has been permitted for a certain time, for one year, or for three years. 1798. 4 *Comm.* 103. 3 *Comm.* 242. *Fleur. Inſt. Jur. Ec.* 347. *Schram*, 252.

6. The cenſure of the biſhop of *Baltimore* is not regular. It is invalid for informality. There ought to have been three admonitions previous to it, in the preſence of witneſſes; unleſs the cenſure be by law, which is public to all. *Beſom. Mor. Chriſt.* 96. 3 *Schram. Inſt.* 292.

7. Notwithſtanding a ſuſpenſion, or even excommunication, a prieſt remains a prieſt. He may adminiſter the ſacrament of the maſs, though under a mortal ſin. He may confeſs and abſolve. A prieſt though he do not preach is not leſs a prieſt. A prieſt cannot become a layman. The laying on of hands gives the holy ſpirit, which cannot be taken away. To ſuppoſe otherwiſe would be inconſiſtent with the preſumption on which the ordination is founded, that he is in a ſtate of grace. The perſeverance of ſaints is an eſtabliſhed doctrine of the Calviniſt church. The elect cannot fall away. The ſpirit of God cannot be taken away by the cenſure of the church. A prieſt who holds an eſtate, on condition of ſaying maſs, is not affected by any interdict or cenſure of the church. *Can. Conc. Trid.* 62, 102, 195. *Conf. of Faith* 101. *Larg. Catech.* 235.

8. This eſtate was vacant, and acquirable by the firſt occupant, qualified for performing the condition. It was not to be given by the executors, or by the biſhop. Any Catholic prieſt, who ſhould firſt ſet his foot on it might take it, hold it, and tranſmit it to his ſucceſſor. Occupancy is a title known to the law, the taking poſſeſſion of things belonging to nobody. This eſtate was of that deſcription. 2 *Comm.* 258.

Young, for the plaintiff. All ſects of religion are protected by our laws; and, if an intruder be indulged in poſſeſſion of property belonging to the Roman Catholic church, the ſame thing will happen in every church.—This caſe muſt be decided with a due regard to the rules of the church of which the defendant is a member. If this man controvert the rules of the church of which he

1798. profeſſes to be a member, he is not a paſtor; to uſe with due reſpect the language of holy writ, "he cometh not in by the door, but climbeth in at a window, and is not the true ſhepherd, but a thief and a robber."

1. The defendant's counſel has contended, that his prieſthood is ſo ſacred, that he cannot be deveſted of it.

I ſhall not diſpute whether the defendant be in a ſtate of grace, or not. All I will ſay is, that, if he be, he has, by contradicting the ſolemn obligations which he has taken upon him, not ſhewn any marks of grace.

No human authority can take from him his ſkill in divinity, ſacred hiſtory, and ſpiritual gifts. But becauſe he poſſeſſes them, has he a right to exerciſe them, wherever he pleaſes. I ſhall ſuppoſe a compleat ſcholar, bred at the univerſity of *Oxford*, inſtructed as a lawyer at the inns of court, and in *Weſtminſter Hall* advanced to the degree of ſergeant or king's counſel, arrives here; is he intitled, without any other formality, to appear at the bar of any court in this country? Let Dr. *Fromm*, with all his gifts of learning and grace, retire to his own country, and there exerciſe them, where the exerciſe of them was firſt permitted.

Apoſt. Can. 12. The rules of his church declare, that, if any prieſt leave his pariſh, and continue in another without his biſhop's conſent, he muſt no longer perform his liturgy; and, if, when his biſhop calls him back, he perſiſt in his irregularity, let him communicate as a layman. If any man will have eccleſiaſtical offices performed without a prieſt conſtituted by the conſent of the biſhop, let him be anathema. *Gangran. Can. 6.*

Fromm acknowledged the authority of biſhop *Carrol*, and accepted an appointment from him. Then he was a wretched beggar, having ſquandered his money, unable to pay his paſſage from *Germany*, and was nouriſhed by the liberality of the biſhop. Now, having obtained what he thinks an eſtate, ſecured to him for life, he ſets the biſhop and the world at defiance. He has violated his ſacred obligation of ſubjection to his ſuperior, the biſhop of *Baltimore*; and, for this contumacious offence has been interdicted and ſuſpended, and is no longer a prieſt qualified for the regular exerciſe of ſpiritual functions.

2. This is ſaid to be a foundation for ſaying maſſes yearly, for the ſoul of Mr. *Browers*. This is too abſurd

to be ſuppoſed in a man of ſuch learning and ſenſe, as Mr. *Browers* poſſeſſed. *Browers* gave this eſtate to enable a poor Catholic congregation to ſupport a prieſt regularly admitted to adminiſter inſtruction and the ſacraments to a flock which he loved. He gave it to his *ſucceſſor* duly appointed according to the rules of his church. Succeſſor will be conſtrued as a prieſt regularly inducted into the care of the ſouls of this congregation, over which Mr. *Browers* exerciſed paſtoral functions. Suppoſe Mr. *Browers* alive, and to preſent to this cure on his foundation, he could not, without the conſent of the biſhop; for the biſhop may reject an unqualified preſentee of the patron. 1798. *Con. Conc. Trid.* 229, 103.

The true point in this caſe is, whether the executors have a right to eject this intruder. I conceive they have a right to keep poſſeſſion, till the eccleſiaſtical ſuperior induct a proper tenant under the will. The will directs, that his debts and funeral expences ſhould be paid. It ſays not out of what fund. The perſonal eſtate has been dilapidated by ſuch another reprobate as the defendant. The real eſtate, then, muſt be a fund for payment of debts. All authorities of this kind will be liberally conſtrued. A man who leaves this world without making proviſion for the payment of his debts muſt remain in purgatory. The executors had no right to preſent an incumbent; but they had a right to take care of the eſtate, till an incumbent came. They could expend money in improvement of the eſtate, erecting a tomb, &c. Hence reſults an authority over it as ſpecial occupants, to fulfil the intention of the teſtator. This objection, like that to the juriſdiction of the biſhop of *Baltimore*, lies not in the mouth of *Fromm*, who has admitted the authority of the executors, by applying for their ſanction annexed to his ſolemn inſtrument of taking poſſeſſion. *Fromm* turns, as he ſtates, to the eaſt, weſt, north, and ſouth; and does not, like each of the two antient patriarchs, content himſelf with two of the quarters, but takes all. And now he contends, that, poſſeſſion having been acquired by him, with the conſent of the executors, their power is exhauſted. The whole tranſaction of his occupancy is fraudulent, and the law will give no efficacy to it. He impoſed himſelf on the executors and the congregation as a prieſt appointed by the biſhop to

1798. officiate in that congregation. And, when ſuſpected and detected, he agrees to give up his poſſeſſion at the will of the biſhop. He goes not to the biſhop for authority, remains in poſſeſſion, and, at the end of the year, the cunning old prieſt fraudulently obtains and deſtroys the only paper, as he thought, which could deſtroy his new claim to the perpetual enjoyment of this eſtate, by virtue of his inherent ſpiritual power of ſaying maſſes; and ſets at nought the ſacred duty, which Mr. *Browers* muſt chiefly have had in view, the care of the ſouls of this congregation. And, to confirm his eſtate, he reſorts to triennial poſſeſſion. But this is where there is a colourable title. However, we have nothing to do with the canon law, as to the poſſeſſion of an eſtate.

Hargr. Co. Lit. 42. *a.b.* 183. *b.* The law, which abhors wrong, will not work a wrong. The law regards a leſs eſtate by right, rather than a larger by wrong. Where the grant cannot take effect according to the letter, the law will make ſuch conſtruction, as that the gift may take effect. In debt for rent, the tenant cannot plead *nil habuit in tenementis*; for the indenture concludes both. An eſtate was left by will to *B.* his heirs, executors, and adminiſtrators, in truſt, for the uſe of diſſenting miniſters, in places where the people are unable to allow them ſuitable maintenance. The truſtee died before the teſtator. It was held, by the lord chancellor, that the truſtee was but an inſtrument, to convey the legacy to thoſe for whoſe uſe it was intended, and that, notwithſtanding his death, the charity itſelf, which was the ſubſtance and reaſon of the deviſe, is ſtill ſubſiſting, and may be anſwered as fully, by the aid and directions of the court of Chancery, as if the legatee were alive. Whatever rules would be adopted in favour of proteſtant diſſenters in *England*, will be applied to Catholics here.

Bull. Ni. Pri. 170, 177.

2 *Eq. Ca. Abr.* 193.

Brackenridge, for the defendant. Mr. *Fromm* came into *America* a prieſt of unqueſtionable character. He having acknowledged the juriſdiction of biſhop *Carrol*, by accepting an appointment from him, I wave the queſtion of the publication of the bull, I wave alſo the neceſſity of monitions, and admit that *Fromm* has been legally ſuſpended.

I reſt on the diſtinction between an eſtate to which cure of ſouls is annexed, and one depending on particu-

lar functions. A prieſt once is a prieſt always. Grace given can never be loſt. Here is an eſtate given on condition of ſaying maſſes. No cenſure can deprive a prieſt of this power. If a man has acquired an eſtate, and diſpoſed of it, as he thought proper, will you apply it to another purpoſe? The executors are not to have it and keep it. A prieſt is to get it, and tranſmit it to a prieſt, and ſo forever: and the poſſeſſor is to perform the ſervice of ſaying four maſſes yearly for the ſoul of Mr. *Browers*. On the death of *Browers*, this eſtate was vacant, to be taken poſſeſſion of by any prieſt, as a ſpecial occupant. *Fromm* took poſſeſſion in a ſolemn manner, under the will, without any conſent of the executors. This made *Fromm's* title for life complete, and the ſubſequent tranſaction, of the article for one year, is either miſrepreſented, or cannot be ſuppoſed to deveſt him of his intereſt. The executors had either no power, or none to leaſe for a year. Whenever they gave poſſeſſion, they were *functi officio*. This is a private eſtate to which no cure of ſouls is annexed. 1798.

Semple, for the plaintiff. *Browers* left this eſtate for the benefit of his poor congregation incapable themſelves of ſupporting a prieſt. *Fromm* comes forward pretending himſelf qualified. This is a fraud and vitiates the contract with the executors. *Fromm's* letter to biſhop *Carrol* acknowledges his juriſdiction, and prays his conſent to admiſſion to this congregation. *Fromm* can only acquire title to this eſtate with the conſent of the biſhop of *Baltimore*, whoſe juriſdiction he cannot controvert.

Suppoſe the ghoſt of *Browers* hovering over us now, would he not bluſh for the conduct of his unworthy ſucceſſor?

Suſpenſion incapacitates from diſcharging the duties preſcribed by the will.

PRESIDENT. This caſe has been argued with ingenuity, and with good ſenſe. Much canonical learning has been expended, the diſcuſſion of which I do not think neceſſary, in deciding this caſe on its merits.

It is to be regretted, that people will apply to ignorant men to write wills and other papers affecting property. Had this will been written by a man of any ſkill,

1798. competent to expreſs the meaning of the teſtator, all this diſpute might have been avoided. The teſtator himſelf had but little acquaintance either with our laws or our language. As the will ſtands, the meaning of the teſtator ſeems to be diſcoverable; and, if it be, we ought, if conſiſtently with eſtabliſhed rules, it be in our power, to carry it into effect.

Theodorus Browers, a prieſt regularly exerciſing paſtoral functions in a congregation, was deſirous of extending to this congregation his good will and ſervices beyond his life. With this view, he made his will and deviſed this eſtate to the prieſt who ſhould *ſucceed* him, and to his *ſucceſſors* forever. And on this ſucceeding prieſt, and every ſucceeding prieſt for the time being, he impoſed the duty of ſaying maſſes. As I view this will, therefore, no man could be legally admitted to the poſſeſſion of this eſtate under the will, but one qualified to ſucceed Mr. *Browers* in the diſcharge of the paſtoral duties in this congregation, according to the rules of the Roman Catholic church. When one ſo qualified to ſucceed Mr. *Browers*, in his paſtoral charge, is admitted into the poſſeſſion of this eſtate, he muſt, to retain this poſſeſſion, continue to diſcharge the paſtoral functions in this congregation according to the rules of this church; and, beſides thoſe paſtoral duties, he muſt ſay four maſſes yearly for the ſoul of Mr. *Browers*.

I lay out of the queſtion all diſcuſſion, whether a prieſt can, by any ſentence of the church, be reduced to the ſtate of a layman, and diſqualified from ſaying maſſes, or diſpenſing any of the ſacraments. It will be ſufficient for me to aſcertain whether *Fromm*, according to the rules of the Catholic church, was qualified to take, and is qualified to retain, poſſeſſion of this eſtate, under the will as I have conſtrued it.

On the conſtruction, which I give the will, he was not qualified to take poſſeſſion of this eſtate; for he was not regularly admitted to exerciſe the paſtoral functions in this congregation; and this eſtate was deviſed for the uſe of a prieſt regularly admitted to the diſcharge of thoſe duties, who ſhould alſo, beſides thoſe duties diſcharge the other duties of maſſes for the ſoul of Mr. *Browers*. His diſqualification has not been removed, but confirmed by the interdict and ſuſpenſion.

Had this been an independent congregation acknowledging no ſuperior authority or appellate juriſdiction over their internal concerns, his prieſt's office, and the aſſent of the congregation might have been a ſufficient introduction of him into the enjoyment of this eſtate. But, in other Chriſtian churches, there are grades of juriſdiction, general and national councils, general aſſemblies, ſynods, and preſbyteries; pope, patriarch, metropolitan, ſuffragan, arch-biſhop, and biſhop. As, in churches of the preſbyterian form, no miniſter can be regularly qualified to diſcharge the paſtoral functions in any congregation or pariſh without the appointment of the preſbytery of the bounds; ſo, in churches of the epiſcopal form, without the appointment of the biſhop of the dioceſe. 1798.

The biſhop of *Baltimore* has, and before, and at the time of *Fromm's* taking poſſeſſion of this eſtate, had the ſole epiſcopal authority over the Catholic church of the *United States*. Every Catholic congregation within the *United States* is ſubject to his inſpection; and, without authority from him, no Catholic prieſt can exerciſe any paſtoral functions over any congregation within the *United States*. Without his appointment or permiſſion to exerciſe paſtoral functions over this congregation, no prieſt can be intitled, under the will of *Browers*, to claim the enjoyment of this eſtate. *Fromm* has no ſuch appointment or permiſſion, and is, therefore, incompetent to diſcharge the duties, or enjoy the benefits, which are the objects of the will of *Browers*.

We cannot ſuppoſe, that Mr. *Browers* intended, that his eſtate ſhould be enjoyed by any vagrant irregular prieſt, who might happen firſt to occupy it. He ſurely meant a prieſt regularly eſtabliſhed as paſtor of this congregation. I feel it a duty to ſtrain every expreſſion againſt the conſtruction, that this is a foundation of maſſes for the ſoul of the dead, without any care of the ſouls of the living. And I find expreſſions in this will, ſufficient to ſatisfy me, that *Browers* deviſed his eſtate to his ſucceſſors in the paſtoral duties over that congregation.

With this opinion, it is not to be ſuppoſed that I ſhould conſider the poſſeſſion of Mr. *Fromm*, acquired

1798. as it was, otherwiſe than as the poſſeſſion of an intruder without any right. He himſelf ſeems in an honeſt moment, to have conſidered it in the ſame light, and ſolemnly agreed to give it up, if the biſhop did not conſent to his eſtabliſhment as prieſt in that congregation.

I have no heſitation in ſaying, that the defendant has no right.

The next queſtion is, whether the executors are the proper perſons to make a leaſe on which to ſupport an ejectment.

We have no court of Chancery in *Pennſylvania*, to ſuperintend the execution of truſts. Perhaps it would have been proper to apply to the legiſlature, to veſt the eſtate in truſtees for the uſes of the will of *Theodorus Browers*. As the caſe ſtands, no perſons are more proper, as leſſors, than the executors. They have a right to poſſeſſion for ſome purpoſes, to build a tomb, &c. I have no inclination to look, with an eagle's eye, into every defect in point of form, when I am ſo clear, that the defendant has no right to poſſeſſion. At any rate, I am not now prepared to ſay, that, on this ground, there ought to be a verdict for the defendant. If the executors be incompetent to make a leaſe, on which to ſupport an ejectment, the defendant may obtain the deliberate opinion of this or a ſuperior court. Now, I think, there ought to be a verdict for the plaintiff.

The jury found a verdict for the plaintiff.

FAYETTE COUNTY,

December Term, 1798.

JOHN WORK *v.* ROBERT GRIER.

CASE, on a contract, made 11th *February*, 1797, of ſale of a plantation and mill, for falſely, fraudulently, and deceitfully affirming, that the mill-dam was ſound, ſufficient, and founded on a rock; truſting to which the plaintiff purchaſed the plantation and mill for 1500*l.* whereas the mill-dam was then unſound, inſufficient, not founded on a rock, and great part of it without foundation.

Of the price 600*l.* was paid at the time of the contract, and bonds given for the reſt, in yearly payments. There was no article of the ſale. But on the bond laſt due, payable in the year 1800, the following writing was indorſed, ſigned and ſealed by the parties. 1798.

"P. S.—This obligation is ſubject to the following ſtipulation, viz. that, if the mill-dam, for the payment of which this bond is a part, ſhould happen to break, by reaſon of a bad foundation only, a deduction of the ſum of one hundred pounds is agreed upon in lieu thereof, in favour of ſaid *Work*. It is alſo agreed, that the ſaid *Work* is to uſe all lawful endeavours and coſts, in order to prevent any breach about ſaid dam, by keeping it ſufficiently dirtied, and free from ſuch ſymptoms as might occaſion the ſame."

A witneſs was called to prove the repreſentation, at the time of the contract.

Campbell and *Pentecoſt*, for the defendant, objected to parole teſtimony, as the parties had reduced the agreement to writing, agreed on the riſk, and fixed the amount of damages, to be deducted out of the laſt bond, if, before it became due, the dam ſhould break. He can get no other damages, but the ſum ſo ſtipulated for. 1 *Fonbl.* 141-4.

Young, *Lyon*, and *Galbraith*, for the plaintiff. The objection is made on a *petitio principii*. This indorſement is not a note of the contract. It is a ſort of poſtſcript to a bond for the payment of the price, providing for a compenſation for a certain contingency, not relating to the eſſential part of the contract, that the dam was founded on a rock. In caſes like this, as on policies of inſurance, parole evidence of want of good faith is conſtantly admitted, as evidence of facts, within the knowledge of the inſured, increaſing the riſk.

Contracts will not be inforced, where there is ignorance or error, in fact or in law; and will be ſet aſide for fraud. There could be no relief againſt fraud, unleſs parole evidence of it were admitted. 1 *Fonbl.* 106. *Kaim's Prin. Eq.* 85, 259.

PRESIDENT. If this writing had been a ſtatement of the contract, there would have been ſtrong reaſons for rejecting parole teſtimony of the repreſentation; as, when parties reduce their converſations to writing, that alone ought to be conſidered as the deliberate and con-

1798. cluſive agreement. This writing does not clearly ſeem to be a ſtatement of the contract. The action is for a fraud in miſrepreſenting a thing within the knowledge of the feller, and not of the buyer; in repreſenting the dam as founded on a rock, when it was not. The foundation might not be *bad*, though not founded on a rock. The writing is to ſecure a certain compenſation, on the contingency of the dam breaking within three years, by reaſon of a bad foundation only. The dam might not break within that time, though not founded on a rock; and yet might be much leſs valuable to the buyer, than if founded on a rock.

Parole evidence of a contract may be inadmiſſible, when a contract is reduced to writing; and yet parole evidence of fraud may be given, of what cannot appear in the writing, viz. the variance of the thing ſold from the repreſentation made of it in the contract.

The principal difficulty in this caſe is, to know whether the writing means the ſame thing by *a bad foundation*, that the declaration means by *not being founded on a rock*; and whether providing compenſation for the dam breaking, by reaſon of a bad foundation, is not waving all other objections to the dam.

Upon the whole, we think it beſt, to admit the teſtimony, and reſerve the point.

It was then proved, that, at the time of the ſale, *Work* had ſuſpicions, that the dam was inſufficient, and objected to it, for want of an apron; that *Grier* ſaid, it was as good a dam as any on the creek, that there was no occaſion for an apron, for it was founded on a rock, and that was better than an apron. It had been founded on a rock; but the fall of the water over the dam had broken through the rock, for a conſiderable diſtance in the middle of the creek, and occaſioned a cavity, through which a conſiderable part of the ſtones in the dam had fallen and been waſhed away, ſo that part of the dam was hollow. It had not however given way, and it was uncertain whether it would, merely on that account. That would depend on caſualties, as ice lodging on the breaſt, &c. This ſtate of the dam was not generally known, till in the ſummer after the ſale; but there was ſome reaſon to believe, that it was in this ſtate, at the time of the ſale, and probably that *Grier* knew

it. The dam continued to ſerve its purpoſe, and the mill went, when other mills on that creek went. 1798.

Young, for the plaintiff. An action lies for cheating by falſe dice, and for ſelling one commodity inſtead of another. Fraud or concealment of any material circumſtance will be relieved againſt, notwithſtanding a warranty. 3 *Com.* 166. 1 *Bro. Chan.* 440. 1 *Fonbl.* 104.

Campbell, for the defendant. 1. Fraud will not be preſumed. You have no evidence, that the dam was not, at the time of the ſale, as repreſented. All the evidence is five or ſix months after. If there was a miſrepreſentation, every miſrepreſentation will not juſtify the reſcinding of a ſolemn contract. To do this, it muſt be wilful, and known to the party. 1 *Fonbl.* 109. 10.

2. Here is a written agreement entered into at the time of the ſale, for aſcertaining the damages, in caſe the repreſentation ſhould fail. *Work* had no confidence in the repreſentation of *Grier*, and relied on this agreement for fixed damages to be obtained at a certain future time. 2 *Powel Contr.* 208.

Young. We differ not as to principles of law; but as to the weight of evidence. The caſes read apply not to this. We are not ſuing for a penalty, nor for reſcinding the contract, and recovering back the money paid, but for damages for a miſrepreſentation which has made *Work* pay a greater price, than he would have paid, if the dam had been truly deſcribed.

PRESIDENT. If there be a wilful miſrepreſentation, or concealment of any material circumſtance, this is a fraud, and damages muſt be given, proportioned to the conſequences of the buyer's confidence in the aſſertion of the ſeller. 2 *Powel Contr.* 203.

If, though there be no wilful miſrepreſentation or concealment, there be an undertaking, at the time of the ſale, that the property ſold is ſuch, as, in a material circumſtance, it turns out not to be, damages muſt be given.

But we would impreſs it ſtrongly on you, that a preſumption of great force ariſes from the writing, that *Work* took on himſelf all riſks, except that of the dam breaking in three years, by reaſon of a bad foundation; and, for that riſk, has meaſured his damages, and ſettled the mode of compenſation.

1798. The jury found a verdict for the plaintiff for 312*l.* 10*s.*

NOTE.—This case had been tried at the preceding term, and a verdict found for the plaintiff: but the jury said, they could not ascertain the damages. At the subsequent term, there was a motion for a new trial, which, without any *interference of the court*, was ended by a compromise.

MOSES HALL *v.* ELIJAH MOOR.

THIS was an action of trespass for taking two horses, two cows, and a steer.

Moor was a constable, and an execution of a judgment before a justice against *Richard Hall*, a son of *Moses*, was put into his hands. *Moses* had, about two years before, removed, from the plantation on which he formerly lived, to another about sixteen miles distant from it, and left his son *Richard*, a married man with a family, in possession of his plantation and the cattle in question, together with smith-tools and other property. *Moor* took the cattle in execution, and sold them for the debt of *Richard*. Two warrants from the justice, who had given the judgments against *Richard Hall*, were offered in evidence.

Meason, for the plaintiff, objected to them, because they were not directed to any one, but to the constable of ; and because they were dated 12th *May*, 179 . *Moor* is not constable of the township in which *Richard Hall* lives, where the cattle were taken.

Lyon, for the defendant. The twenty pound law is to be considered as distinct from the other laws giving
3 *St. L.* 540. jurisdiction to justices. The 9th section says, "upon delivery of an execution to any constable." These warrants are for debts above 10*l.* and we can prove, that they were delivered to *Elijah Moor*, a constable.

PRESIDENT. No answer has been given to the objection. We see no authority given to *Elijah Moor*. The omission is too gross to be overlooked.

Kennedy and *Lyon*, for the defendant, moved for a nonsuit. This action is not maintainable. The plaintiff was not in possession, and possession is necessary to

ſupport treſpaſs. The plaintiff ought to have brought Trover, when he could have recovered, on proving property in himſelf, and converſion by the defendant. This is decided in the caſe of *Ward v. Macauley*. There the plaintiff had leaſed his houſe ready furniſhed to lord *Mountfort*. On an execution againſt the tenant, the ſheriff ſeized part of the furniture, though he had notice that it was the property of the landlord *Ward*. For this, treſpaſs was brought. At the trial lord *Kenyon* thought, the plaintiff ſhould have brought trover. A verdict however was taken for the value of the goods, with leave to move for a nonſuit. On a motion for this purpoſe, lord *Kenyon* ſaid, "The diſtinction between the actions of *treſpaſs* and *trover* is well ſettled: the former is founded on poſſeſſion, the latter on property.—Here the plaintiff had no poſſeſſion; his remedy was by an action of trover, founded on his property in the goods taken." The rule for a nonſuit was made abſolute. The caſe before this court is ſo like that caſe, that I cannot doubt, that a nonſuit will be ordered here. 1798. 4 T. Rep. 489.

It may be ſaid that, in that caſe, there was a leaſe for a limited time. In this caſe there is a ſurrender of the poſſeſſion ſimilar to that. In that caſe, there was a leaſe, which fixed the terms on which the poſſeſſion was given. In this, none but the father and the ſon knew the terms, and a deceit was impoſed on all others.

Treſpaſs is not maintainable where poſſeſſion is in another by delivery; except in caſes of neceſſity that there may be a remedy for a right. A rector may maintain treſpaſs for taking tythes ſet out, for poſſeſſion is conſtrued to follow ſeparation. So may a carrier from principles of policy, to protect commerce in a fluctuating ſtate. Here, there is no neceſſity for a conſtructive poſſeſſion in the father: the relation ſubſiſting between him and his ſon will rather couple a right with the ſon's poſſeſſion; and the father may have remedy againſt the ſon. And, having parted with the poſſeſſion, he is excluded from the remedy of an action of treſpaſs which is given for a violation of poſſeſſion; and muſt recur to trover, by which redreſs is given for a violation of right. Property alone will not alone ſupport treſpaſs. If trees be cut by a ſtranger on land leaſed, the owner muſt bring trover, and the tenant treſpaſs. 2 Woodeſon. 263.

1798. *Campbell* and *Meaſon*, for the plaintiff. The caſe of *Ward* and *Macauley* differs from this caſe. There, the plaintiff had parted with the ownerſhip of his property, for a limited time; and the tenant had an intereſt, which might be ſeiſed by his creditors. Here, there was no contract for any time; and the plaintiff might take them when he pleaſed. *Richard Hall* had no intereſt to be taken. He was a mere agent, and had only a care or overſight of the property, as a butler or ſervant. Treſpaſs lies for breaking open a box, delivered to keep, and taking goods out of it; for wherever a man has neither a general nor a ſpecial property, and he converts goods, treſpaſs will lie.

Bull. Ni. Pri. 83.

PRESIDENT. It is contended that *Moſes Hall* cannot ſupport treſpaſs, becauſe he had not poſſeſſion of the property taken, at the time of the taking, and poſſeſſion being eſſential in treſpaſs, the plaintiff muſt be nonſuited; and may bring trover, which can be ſupported on property alone without poſſeſſion.

4 *T. Rep.* 490

Bull. Ni. Pri. 83. *See* 5 *Bac. Abr.* 164. 5 *Com. Dig.* 577-8.

On the other hand, it is contended, that property alone without poſſeſſion will ſupport treſpaſs; and that, (if it were otherwiſe) in this caſe, the poſſeſſion of the ſon is the poſſeſſion of the father, for the ſon was but his agent.

3 *Woodeſon*, 212. 1 *Burr.* 31.

There is a material difference between treſpaſs and trover. Trover waves the treſpaſs in taking, admits the poſſeſſion to have been lawfully gotten; and proceeds to recover damages only for the unlawful converſion. In treſpaſs, a jury may alſo give damages for the taking.

The motives are peculiarly ſtrong to ſupport this diſtinction, in favour of an officer compellable to take the goods of a certain perſon, when property ought to be preſumed from poſſeſſion, and the taking to be viewed in the moſt favourable light, and, if poſſible, not as a treſpaſs.

However, as it is to be wiſhed, that the diſpute between theſe parties may be ſoon terminated, and there are circumſtances, which may induce the jury to find for the defendant; we will not direct a nonſuit, but give the defendant leave to move for a nonſuit after the verdict.

Lyon and *Kennedy*, for the defendant, contended, that poſſeſſion was evidence of property, or of a fradulent

intention to deceive creditors, which would be equiva- 1798.
lent. If one taking goods in execution, leave them in
the poſſeſſion of the owner, a ſubſequent execution will a *T. Rep.* 596
take and hold them.

Campbell and *Meaſon*, for the plaintiff. This is not an action againſt a conſtable, but againſt *Elijah Moor*, who, though a conſtable, has not been able to ſhew any authority for taking the goods in queſtion. There was no colluſion nor deception of creditors: all the country knew the property to be in *Moſes Hall*.

PRESIDENT. The firſt queſtion is, whether the property be the plaintiff's, or his ſon's. If his ſon's, the plaintiff has ſuffered no damage, and can recover nothing. If the plaintiffs', you will find in damages the value of the property taken, but no more; for, having left the property in poſſeſſion of his ſon, he gave reaſon to believe, that it was his ſon's, and an officer, under ſuch circumſtances, ought not to be puniſhed.

2. Poſſeſſion is evidence of property, or of a fraudulent colluſion between the owner and poſſeſſor; and he, who gives the credit, muſt bear the loſs. The queſtion then will be, whether *Moſes Hall*, in leaving this property in the poſſeſſion of his ſon, did any thing more, than is uſually done, without implying any right; or, whether he meant it as an advancement to his ſon; or, though he did not mean it ſo, whether he gave reaſon to believe this, and, thereby, gave a falſe credit to his ſon. If he either meant that the cattle in queſtion ſhould be the property of his ſon, or that this ſhould be believed, you will conſider the property as accompanying the poſſeſſion, and you ought to find for the defendant..

The Jury found a verdict for the plaintiff, damages 43*l.* 17*s.* 6*d.*

NOTE. A nonſuit was moved for at the next term. But as the court, to induce the parties to a compromiſe, had given no opinion, when theſe notes were concluded; I have incorporated the arguments and obſervations on the motion for a nonſuit after verdict, with thoſe made on the trial.

WASHINGTON COUNTY.

February Term, 1799.

LUCY, a Negro woman, *v.* REASIN PUMFREY.

1799. LUCY brought a writ *de homine replegiando* againſt the defendant, who held her as a ſlave. It was admitted, that on or before 1ſt *March*, 1780, and between
1 *St. L.* 838. that, and on and after 1ſt *January*, 1786, *Reasin Pumfrey* was an inhabitant of that part of the county of *Weſtmoreland*, which, in 1781, was erected into the county of *Waſhington*, of this ſtate; and, during the whole of that time, held *Lucy* with him, as a ſlave; and ſince that time, and till the ſuing out of this writ, has held her, as a ſlave, in *Virginia*; and that, after 13th *April*, 1782,
2 *St. L.* 55. and before 1ſt *January*, 1783, *Reasin Pumfrey* regiſtered, with the clerk of the ſeſſions of *Waſhington* county, the following *Negro* ſlaves, to wit, *Rachel*, a female, aged 28 years; *Ruth*, a female, aged 13 years; *Ben*, a male, aged 10 years; *Dinah*, a female, aged 8 years; *Lot*, a male, aged 4 years; and *Kate*, a female, aged 6 months.

Simonſon, for the defendant, offered parole teſtimony, that, at the time of the regiſtration, *Pumfrey* had but ſix ſlaves; that among them was *Lucy* the plaintiff; that ſhe is the ſlave regiſtered by the name of *Ruth*; and that ſhe was never known by the name of *Ruth*.

Campbell, for the plaintiff, objected to the admiſſion of this teſtimony. It would defeat the purpoſes of identifying, by the regiſtry, thoſe ſlaves, who, after 1ſt *November*, 1780, or 1ſt *January*, 1783, ſhould be held as ſlaves; and would reduce the whole ſyſtem to the evaneſcent, precarious, and deluſive teſt of parole evidence; the memory or faith of witneſſes to diſtant tranſactions. It would be to admit preſumption in favour of ſlavery, and againſt freedom and the record. The preſumption ought to be otherwiſe, that, the name of the plaintiff not appearing on the record, ſhe has never been recorded, and is, therefore, free.

Simonſon. I admit that this act ought to be conſtrued liberally in favour of freedom, and ſtrictly againſt pro-

perty. But it must be so construed, as to effect the intention of the legislature, and produce the least mischief. It is sufficient, if we can establish, that the plaintiff was, at the time mentioned by the law, and yet is, the slave of *Reasin Pumfrey*, and the same person registered by the name *Ruth*. The description of *Ruth*, as to age, sex, and colour corresponds with the sex, colour, and age at that time of *Lucy*. 1799.

PRESIDENT. The question may be of considerable importance, and deserve further discussion; I hope, therefore, the party against whom our opinion is will put it in a way of being examined on a writ of Error. And I am glad, for this reason, that our opinion happens to be against the party best able to do this.

We do not admit the testimony. It would reduce that certainty of a registry, intended by the law, to a state of absolute uncertainty. An error in the christian name is essential, unless corrected by another description annexed, as wife, bishop, earl, &c. Fraud and perjury would be let in, to defeat the purposes of the law, and make slaves of *Negroes* really free. The fault lies with the master, and he must bear the consequences.

Simonson tendered a bill of exceptions.

There was a verdict for the plaintiff.

ALLEGHENY COUNTY,

March Term, 1799.

PENNSYLVANIA *v.* JAMES STOOPS.

STOOPS was indicted for the murder of *Catharine*, his wife.

Her death was occasioned by burning. Her back, thighs, and legs were severely burnt. She survived it about three weeks.

Her deposition taken in writing by a magistrate, about five days after the burning, and signed by him, was offered in evidence.

1799. *J. Campbell* for the prisoner, objected to this testimony,—1. If the wife had been alive, she could not have been admitted for or against her husband. This is a general principle: they are but one person in law. Lord *Audley's* case is the ground on which all exceptions to this rule have been founded; and it is now settled, that this case is not law. If she could not have been a witness, while alive, her deposition cannot be read after her death. For, if a witness be incompetent, when the deposition is taken, competency when it is offered in evidence will not make it admissible. It is true, that, after the death of the wife, one reason for this rule, the maintenance of domestic peace, and mutual confidence, no longer exists: but the rule is general, and controls all other considerations.

Gilb. L. Ev. 133-5. 2 *Hawk.* 607-8.—2 *Bac.* 286.—1 *Hale P. C.* 48, 3 1, 660-1.—1 *Eq. Ca.* 2 5-6. *Sir T. Ray.* 1. 2 *Eq. Ca.* 396.

2. This deposition is not signed by the deponent: it is, therefore, imperfect and inadmissible.

2 *Hale* 284-5 2 *Eq. Ca.* 417.

Galbraith, for the state. The necessity of the case often requires the admission of interested witnesses, as in larceny, &c. Personal force and secrecy are reasons for admitting the testimony of the wife against the husband. The deposition of a witness, afterwards dying or unable to attend, may be read. A wife is a witness against her husband in an indictment for an assault and battery.

Gilb. L. Ev. 133-5.

1 *Str.* 500.

PRESIDENT. I have been generally impressed with an opinion, that, in cases of secret personal injury, a wife may, on her own testimony, obtain protection against her husband, and be a witness, to procure his punishment. She may obtain surety of the peace from him, on her own oath. The only or chief ground, on which this has been doubted, the maintenance of conjugal peace, exists not after the death of the wife.

1 *Comm.* 443. *Hargr. Co. Lit.* 6 *b.* 1 *Str.* 633. *Bull Ni. Pri.* 286-7.

The objection, that the deposition is not signed seems to rest on cases of examinations under certain acts of parliament, or of unfinished examinations. But if the declarations of the dying person had not been written, nor sworn to, would they not have been admissible?

3 *Str.* 499.

In the case of the *King v. Reason* and *Franter*, the dying declarations of Mr. *Luttrel*, though not on oath, were given in evidence by a witness who heard them. And it was held, that a paper, on which his declarations on oath were written by the same witness, who was not a magistrate, though not signed by Mr. *Luttrel*, or by

the magiſtrate who adminiſtered the oath, would have been better evidence, than the memory of the witneſs. 1799.
In *Woodcock's* caſe, the dying declarations of a wife murdered by her huſband, taken on oath, and reduced to writing by a magiſtrate, and ſigned by him, with her mark made on the paper in approbation of its contents, were admitted in evidence on an indictment of murder againſt the huſband; and, on this teſtimony, he was convicted and executed. This caſe was tried before judges of great learning and talents. Nor does it ſeem abſolutely neceſſary, for the competency of ſuch evidence, that ſuch declarations ſhould be made under an immediate apprehenſion of death, though that be one great ground of their competence and credit. *Leach's Ca.* 437. *Radburne's caſe, Leach* 399. *Woodcock's caſe, Leach* 437.

We will admit the teſtimony: but the point may be reſerved.

The magiſtrate who took the depoſition proved, that it was drawn up in the words of the deceaſed. It ſtated, that on a frivilous offence, after ſcolding her, *Stoops* threw her on the fire, that ſhe eſcaped from him, and got out of doors, that he purſued her, dragged her in again, threw her again on the fire, and held her on the fire, and burnt her ſo as ſhe then was.

Galbraith then offered to read a confeſſion of *James Stoops*, written on the ſame paper, by the ſame juſtice.

J. Campbell objected, that this confeſſion was not ſigned.

PRESIDENT. I conſider this objection as ariſing out of the particular proviſions of the Engliſh ſtatutes.— We will admit the teſtimony: you may have the point reſerved if you pleaſe. *Gilb. L. of Ev.* 157-9.

The confeſſion was proved by the magiſtrate, and amounted to this:—That ſhe was abuſing him, and he had thrown her on the fire; that ſhe got up, and ran out of the houſe, and, when ſhe came in again, her cloaths were on fire. He denied that he dragged her back into the houſe; and he gave no anſwer, when aſked whether he had thrown her into the fire a ſecond time.

In all her converſations after the burning, ſhe declared, that her huſband threw her into the fire, and charged him with her death. He refuſed to let a phyſician be called to her:—One was called. He was examined as a witneſs; and ſaid, that, in ſome places, the ſkin and muſcles were burnt away; in ſome places, her

1799. flesh was like roasted meat, and, in some places, there were ulcers; that it appeared impossible that she should survive; and that the burning caused her death.

It was proved, that both husband and wife were addicted to drunkenness, were often drunk, and quarrelled and fought with each other; that she was often the aggressor; that they were both drunk in the morning of the day on which the burning happened, that they were left alone in the house in that condition, before the burning, and found so, and in very ill humour with each other, after it.

The prisoner's counsel urged, that the throwing on the fire might be accidental, or in self-defence; and the burning be from incapacity in her to rise, or him to raise her; and that the killing was but homicide *per infortunium*, or, at most, manslaughter.

Galbraith, for the state, admitting that it was not murder in the first degree, earnestly contended that it was murder in the second degree.

The jury found him guilty of voluntary manslaughter; and he was sentenced to imprisonment and hard labour for five years.

GILES, a Negro Man, *v.* JOSHUA MEEKS.

ON a writ *de homine replegiando*, a certificate of the registration of the plaintiff as a slave, on 19th *December*, 1782, was produced, under seal, from the clerk of the sessions of *Washington* county.

Brackenridge, for the plaintiff, offered evidence, that *Hull*, the master who then owned him, had confessed, that *Giles* was not registered, till after *January*, 1783. 2 *St. L.* 55. The act of 13th *April*, 1782, requires a registration before *January*, 1783.

Semple, for the defendant. Proof of this kind would destroy the record: and this cannot be done by parole proof.

Brackenridge. This act has been construed liberally in favour of the master; and, considering the act of registering as a ministerial act, though informal, it has

been held ſufficient. But it will alſo be conſtrued li- 1799.
berally in favour of liberty, and conſidered as a miniſ-
terial and not a judicial act; it may be impugned by proof of fraud. It is not a record againſt which nothing can be averred; but reſembles the certificate of recording a deed.

PRESIDENT. Proof of fraud in the entry of *Giles* is proper. But, as there may be a doubt, whether this proof, as againſt *Meeks*, the preſent maſter, may be made by declarations of *Hull*, we will admit the teſtimony, reſerving this point.

It was then proved, that, after the year 1782, and perhaps in 1784, *Hull*, being aſked whether he had recorded *Giles*, ſaid no; that, at a certain time after the year 1782, he ſaid, he was going to *Waſhington* to have his Negro recorded, meaning *Giles*; and that, when he had returned, he ſaid, he had got it done; and that, perhaps in 1784, having been admoniſhed to have his Negro recorded, he ſaid to *Meeks*, (the defendant) who alſo had Negroes, that one or other of them muſt go to *Waſhington*, and have their ſlaves recorded.

The defendant produced a witneſs, who ſwore, that in 1783, he aſked *Hull*, whether he had recorded his Negro, and he ſaid, he would be very ſorry to leave ſuch property in riſk; and, that he and *Joſhua Meeks* both had their Negroes recorded.

Semple, for the defendant. The proof for the plaintiff is too inaccurate as to diſtant dates, to be received to contradict an official act and certificate; eſpecially when that proof is oppoſed by contradictory proof.—*Hull* was under no obligation to give true anſwers to every impertinent queſtion.

Brackenridge, for the plaintiff. The entry is impugned by direct declarations with preciſe dates, aſcertained by circumſtances. The proof for the defendant oppoſes not, but confirms, that given for the plaintiff. *Hull* does not ſay, that he recorded *Giles*; but, by evading a direct anſwer, ſeems to admit, that he had not. Notice is alſo brought home to *Meeks*, and he is, therefore a *mala fide* purchaſer.

PRESIDENT. Though we have ſaid, that proof of fraud in the entry of *Giles* is admiſſible, yet ſuch proof

1799. ought to be weighed with ſcrupulous caution, when ſet up againſt an official act. Every reaſonable preſumption ought to be made in favour of the certificate. It was not uncommon for one to enter the ſlaves of another his neighbour or friend, without the knowledge of the proper maſter. You will conſider to which of the witneſſes *Hull* ſpoke the truth. If you diſbelieve the teſtimony on the part of the plaintiff, or have ſufficient ground to believe, that *Giles* was entered before *January*, 1783, though *Hull* knew it not; you will find for the defendant. But if you believe, that *Giles* was not entered till after *December*, 1782, you will find for the plaintiff, notwithſtanding the certificate of entry in *December*, 1782.

The jury found a verdict for the defendant.

Mr. *Brackenridge* moved for a new trial.

WESTMORELAND COUNTY.

March Term, 1799.

PENNSYLVANIA *v.* HENRY BECOME, JOHN READING, JAMES ECKLES, and SAMUEL DICKSON.

THESE men lived on the frontier of *Westmoreland*, near *Lycoming* county. *Becomb* and *Reading* went, as they ſaid, to trade with two *Indians*, who had a hunting camp on the frontier of *Lycoming*, near *Westmoreland* county. They had with them half a peck of ſalt to buy deerſkin for *moccasins*. On their way, they perſuaded one *Shallenberger*, (a lad who then worked at a houſe to which the *Indians* ſometimes came, to trade for corn) to go with them, to ſhew them the camp; and he took with him half a gallon of whiſkey. The *Indians* were abſent, when they went to the camp. There was no fire in the camp; but there were deerſkins there hanging on poles, bearſkins, deer-tallow, bear and deer meat, &c. *Becomb* and *Reading* carried off twenty-ſix deerſkins; and a few days after returned with *Eckles* and

Dickſon, and they plundered the camp of every thing, except a little deer-meat. 1799.

The *Indians* had behaved peaceably, occaſionally came into the ſettlement to trade, and traded honeſtly. Finding their camp plundered, one of them came to the houſe where *Shallenberger* had worked, and, by ſigns, complained of their loſs. Some men of the houſe returned with him to the camp; where the *Indians* ſignified the articles which they had loſt; ſhewed, by a notched ſtick, on which they had marked an inventory of their peltry, that they had been plundered of ſixty-eight deerſkins, and nine bearſkins; and ſignified the loſs of about 40*lb.* weight of deer-tallow, 60*lb.* of bear meat, two yards of brown woolen cloth for *leggings*, two yards of callico, and one cotton handkerchief. The men to whom the *Indians* thus diſcloſed their loſs, conducted them to a magiſtrate, who, on their complaint, iſſued a warrant to ſearch for the goods, and, on the information of *Shallenberger*, a warrant to apprehend *Becomb* and *Reading*, and alſo *Eckles* and *Dickſon*, againſt whom ſuſpicions appeared. *Becomb* and *Reading* were committed to gaol; but, there not being ſufficient proof againſt *Eckles* and *Dickſon*, they were diſcharged. On a further ſearch, the conſtable found nineteen deerſkins, two bearſkins, and a piece of brown woolen cloth, like the *leggings* which one of the *Indians* wore, hidden in a bark box under two trees which had fallen near *Becomb's* houſe. *Becomb's* wife deſired them not to touch the bark, for ſhe had meat there; and, when opened, ſhe claimed the woolen cloth as hers. Finding the conſtable would take all away, ſhe declared, that her huſband ſhould not ſuffer alone; that *Eckles* and *Dickſon* went with him and *Reading*, (when theſe laſt went the ſecond time to the camp) and were the moſt urgent to go, and threatened violence to the *Indians*, if they met them; and that the ſkins were equally divided among the four. On her information, the magiſtrate ſent the conſtable for *Eckles* and *Dickſon*. *Eckles* was taken and committed to gaol. *Dickſon* had abſconded and was not taken.

While *Becomb* and *Reading* were firſt at the *Indian* camp, they propoſed to *Shallenberger*, (as he ſwore) that he ſhould ſell his whiſkey to them, and they would pay

1799. him as well as the *Indians* would have done. They drank the whiſkey. After their return, *Becomb* and *Reading* gave *Shallenberger* ſeven deerſkins, (as he ſwore) for his whiſkey. One of them he had diſpoſed of. The other ſix he gave up to the magiſtrate; which, together with the nineteen found at *Becomb's*, made twenty-five of the ſixty-eight deerſkins ſtolen; and thoſe, with the two bearſkins and piece of brown cloth found at *Becomb's*, were depoſited with the magiſtrate.

Becomb and *Reading* were tried, on one indictment, for ſtealing twenty-ſix deerſkins; and they and *Eckles* were tried, on another indictment againſt them and *Dickſon*, for ſtealing forty-two deerſkins and the reſt of the property loſt by the *Indians*.

Brackenridge and *Young*, for the priſoners. The taking ſeems to be proved; but it is not felonious. It was in open day and avowed, and is but a treſpaſs. The property was abandoned, and not in poſſeſſion of any one. The *Indians* had no property in the things taken. They had no right to come upon our lands to hunt. They were treſpaſſers on the lands of the ſtate, or of ſome private perſon. And felony cannot be committed by taking things whereof no one had property, as wreck, or things *feræ naturæ*, as deer, or fiſh in a river. It may be a miſdemeanor; and, if the jury find it ſo ſpecially, the court may give judgment, on this indictment, as for a miſdemeanor.

Leach's Ca. 351.

1 *Hawk.* 143-4.

2 *Hawk.* 622-6.

Galbraith, for the ſtate. An indictment lies for ſtealing goods of a perſon unknown. This property was as much in poſſeſſion of its owners, as property of ſuch nature, and of ſuch owners, uſually is. An indictment will lie for ſtealing a horſe in a paſture, or in the commons, as well as in the ſtable.

PRESIDENT. The taking ſeems proved; and the ordinary evidence of the felonious intention, a denial of the act, appears in this caſe. There is even ground to believe, that they left their homes with this intention. Half a peck of ſalt was but a poor ſtock to trade on.

4 *Comm.* 232.

I know no law rendering it unlawful for an *Indian*, any more than a white man, to hunt on the lands of others. Whether the *Indians* were treſpaſſers or not, the authorities cited prove that they were not thieves. Their labour in killing the deer and bears, *feræ naturæ*,

gave the *Indians* a property in the ſkins, meat, and tallow of thoſe animals. It would be ſtrange, if the taking could not be felony becauſe it was in the day time, and the offenders impudently avowed it among themſelves. The property was as much in the poſſeſſion of these *Indians*, as articles of this nature uſually are. And if you think the priſoners took and carried them away with an intent of converting them to their own uſe, without the knowledge of the owners, there is no occaſion for your finding a ſpecial verdict; you may find the priſoners guilty. 1799.

The jury found them guilty.

Becomb, *Reading*, and *Eckles* were then tried on the ſecond indictment, and found guilty.

NOTE.—Next day, before judgment was given, *Becomb* broke out of gaol. *Reading* and *Eckles* were ſentenced to 18 months confinement to hard labour, on the laſt indictment; and *Reading* to 6 months additional, on the firſt: and it was ordered, that the whole ſhould be in the gaol and penitentiary houſe in *Philadelphia*.

In the morning after the laſt verdict was given, a man went into the gaol, to endeavour to get, from *Reading* and *Eckles*, information reſpecting the reſt of the ſkins. They informed where they were hidden; and meſſengers were ſent to ſecure them, and reſtore them to the *Indians*. The *Indians* were preſent at the trial: they appeared to be poor, and from a ſenſe of the loſs which they had ſuſtained, and of the danger which reſentment for ſuch loſs might bring on the frontier inhabitants, and a deſire to ſhew the *Indians* the benefit of appealing to our tribunals for redreſs; ſome gentlemen contributed about 40 dollars, which were laid out in cloathing, and other uſeful articles for the two *Indians*; with which, and aſſurances of reſtitution for their property loſt, they departed well pleaſed.

Leſſee of JACOB WELKER *v.* PRISCILLA COULTER.

1799. THIS was an Ejectment for a meſſuage and 300 acres of land, in *Franklin* townſhip, brought to *March* term, 1798.

The plaintiff ſhewed a warrant, dated 8th *January*, 1773, for 100 acres of land, on a branch of *Turtle-creek*, on the north ſide of general *Forbes's* old road, and on the ſouth ſide of the path leading to *Plumb-creek*; including a white-oak, marked *J. W.* ſtanding on the weſt ſide of the bottom of ſaid branch; in *Fort-Pitt* townſhip, in the county of *Weſtmoreland*. He then ſhewed a ſurvey of 255 acres and the allowance, made, on this warrant, 25th *June*, 1773, by *Eli Coulter*, deputy of *Robert M'Crea*, who was deputy ſurveyor of the diſtrict in which the land is.

The defendant, (who is the widow of *Eli Coulter*) claiming under the ſame title produced a conveyance, dated 26th *July*, 1787, for the conſideration of 20*l.* by *Jacob Welker* to *Eli Coulter*, of this warrant and all the land ſurveyed or to be ſurveyed on it; and a patent to *Eli Coulter*, on the ſurvey made by him, dated 31ſt *March*, 1789.

The plaintiff's counſel then propoſed to prove, that the conveyance from *Welker* was fraudulently obtained. And evidence was given, that, in *April*, 1787, when a deputy ſurveyor came to make a ſurvey of this land for *Welker*, on his warrant, *E. Coulter* repreſented, that he had a ſurvey of it made on an early location, and that perhaps then there was a patent; that, however, as he could lay *Welker's* warrant on adjoining land, which would be uſeful to him, he would buy his warrant, and put an end to diſpute; that he did then buy it, for 20*l.* and had a ſurvey of 40 acres adjoining made on it; and that he afterwards returned his former ſurvey of 255 acres on *Welker's* warrant, and took out a new warrant for the 40 acres.

It was then proved for the defendant, that *E. Coulter* had an old improvement and ſettlement, which had been begun in 1772; that a cabbin was then built, and three acres of land deadened. In 1773 *Coulter* and another

man with him worked occaſionally on the land, cleared out the three deadened acres, ſowed that with turnip ſeed, and, in the fall, with rye. In 1774, the inhabitants of that part of the country were driven off by the *Indian* war. In the ſpring of 1775, *Coulter* put a tenant on this land, who reſided on it, cleared out the old ground and 5 acres more, planted 4 acres in corn, and that and all the reſt in fall grain. In 1776, another field of 4 acres was cleared by *Coulter*. In 1777, *Coulter's* tenant was driven off by the *Indian* war; and that part of the country being generally deſerted, till after the war, nothing more was added to the improvement, till about nine or ten years ago, when *Coulter* put a tenant on it, who yet remains. There are now 30 acres of up-land, and 10 acres of meadow, cleared, fenced, and cultivated. 1799.

Coulter had no tenant living on the land in 1787, when *Welker* came to ſurvey; and there was contradictory teſtimony as to the extent of his improvement in 1773, when *Welker* firſt viſited the land, found *Coulter* working on it, and told him he had a warrant for it.

There was teſtimony alſo, that, at the time of making the purchaſe of *Welker's* warrant, *Coulter* repreſented his title as reſting on his ſettlement; but ſaid alſo, ſhould that fail, he had, or he could have, an old location; the witneſs who proved this did not hear him ſpeak of a patent, but had heard him ſay, before he ſaw *Welker* or knew any thing of his claim, that he had a location in the name of *James M'Clure*. *Coulter's* ſurvey was made in 1772. He died ſeven or eight years before this ejectment was brought.

The deſcription in the warrant did not preciſely and excluſively deſignate this land, and there was no evidence of a tree marked *J. W.* on it.

Brackenridge and *Morrow*, for the plaintiff, ſtated, that the purchaſe being founded on a groſs miſrepreſentation, a *ſuggestio falſi*, by *Coulter*, in ſaying he had a title, when it is evident that he had none, is fraudulent, and therefore void: and the title of *Welker* ſtands as if he had made no conveyance. 1 *Wils.* 235. 1 *Fonbl.* 113, 228.

No ſubſequent tranſactions will confirm a fraudulent bargain, nor length of time bar a claim of relief againſt it. Equity relieves againſt a miſtake or miſapprehen- 1 *Wils.* 320. 1 *Fonbl.* 322, 106, 60. 1 *Wils.* 283.

1799. ſion of title, againſt undue advantage taken of neceſſity, or where weakneſs of underſtanding founds a preſumption of undue influence.

2 *St. L.* 282, *Young* and *M'Keehan*, for the defendant. The act of aſſembly bars any action for land, on a claim founded on a warrant without a ſurvey, unleſs the party has been in poſſeſſion within ſeven years. It is in proof, that *Welker* never had a ſurvey nor poſſeſſion. Laches are 1 *Fonbl.* 319. not indulged. *Welker* has lien by an unreaſonable time, not only during the life of *Coulter*, but ſince his death; and there is reaſon to ſuſpect, that he is not the perſon really intereſted in this ſuit, and that others have ſtirred it up. If *E. Coulter* had been now alive, he could have explained and eſtabliſhed the repreſentation of his claim, which he made to *Welker:* and we are not to believe, that, before his purchaſe of *Welker's* warrant, *Coulter* had no location for this land, becauſe he afterwards returned his ſurvey on this warrant. He had paid a great price for the warrant, and was right in making the beſt of it. It has been a very general practice in this country, for perſons who had old locations, in order to evade the payment of intereſt on the purchaſe money, to take out new warrants for their land. When the ſtate had given the *Virginia* claimants their lands ſo cheap, it was thought by the *Pennſylvania* ſettlers, that the cheapeſt method to them was fair.

PRESIDENT. It is not neceſſary to embarraſs the deliberations on the facts with any conſideration of the limitation of this action, as, it being clear that the plaintiff never was in poſſeſſion, this is a mere queſtion of law.

If *E. Coulter* obtained the conveyance from *Welker* by a fair contract, or, though the contract was not fair, if, at the time of the purchaſe, he had a better title than *Welker*, there muſt be a verdict for the defendant.

It is generally underſtood, that many poſſeſſed of old locations have abandoned them, and taken out patents on new warrants. How far this is a fair practice, as reſpecting the ſtate, is not material, in this action, to enquire. You have evidence, that before *Coulter* knew of *Welker's* claim, he ſaid, that he had a location in the name of one *M'Clure*. This may have been true, and on this location he might have intended to return his

1799.

furvey of this land. But after the purchaſe of *Welker's* warrant, for which 5*l.* ſterling muſt have been paid to the Land-Office in 1773, he might have thought it more advantageous to abandon this location, or apply it elſewhere, and return his ſurvey on *Welker's* warrant. If ſuch be the truth, the tranſaction is fair, and *Coulter's* title good.

But if *E. Coulter* repreſented to *Welker*, that he had an old title, when, in fact, he had none; and if this was the only or the principal motive which induced *Welker* to ſell his title; if, without this motive, *Welker* would not have transferred his claim; this is ſuch a fraud as renders the purchaſe void, and all the title, which *Welker* then had, yet remains in him.

But as fraud in *Coulter* cannot make *Welker's* title better than it was, and every plaintiff in ejectment muſt recover on the ſtrength of his own title, even though this purchaſe were fraudulent, if *Coulter* had then a better title by a prior ſettlement (or location and ſurvey) his fraudulent purchaſe of the warrant will not deſtroy his prior title by ſettlement.

This warrant is not ſo ſpecially attached to this land, by its deſcription, as clearly to point out this as the land claimed by it, and exclude any other title from it. Before a ſurvey made on this warrant, it does not excluſively affect this land. *Coulter* returned his ſurvey on *Welker's* warrant, in conſequence of his purchaſe of this warrant: and, if the purchaſe be void, *Coulter's* ſurvey muſt be detached from *Welker's* warrant. *Welker* never made a ſurvey on this warrant; and he made no attempt to ſurvey, till in 1787; and before that, and certainly in 1775, an actual ſettlement was made by *E. Coulter*.

The jury returned to give a verdict, but the plaintiff being called, appeared not: and there was judgment of nonſuit.

APPENDIX.

APPENDIX.

THIS Preamble is as follows:—"The 3d day of *April*, 1769, being appointed for opening the Land Office for the New Purchaſe made at the treaty of *Fort Stanwix*, and it being known, that great numbers of people would attend ready to give in their locations at the ſame inſtant; it was the opinion of the governor and proprietary agents, that the moſt unexceptionable method of receiving the locations, would be to put them all together (after being received from the people) into a box or trunk, and after mixing them well together, to draw them out, and number them in the order they ſhould be drawn, in order to determine the preference of thoſe reſpecting vacant lands. Thoſe who had ſettled plantations, eſpecially thoſe who had ſettled by permiſſion of the commanding officers to the weſtward, were declared to have a preference. But thoſe perſons who had ſettled or made, what they call improvements, ſince the purchaſe, ſhould not thereby acquire any advantage. The locations (after being put into a trunk prepared for the purpoſe, and frequently well mixed) were drawn out in the following order.

The act of 1ſt *April*, 1784, confirming the boundary line between this ſtate and *Virginia*, having recogniſed private rights eſtabliſhed under that ſtate, makes good certain titles derived from that ſtate to land within this.

There are ſome titles for land in this ſtate granted for military ſervices to *Virginia* officers, under the king's proclamation of 1763.

Previous to the ratification by *Virginia*, of the boundary line, the Aſſembly of that ſtate had by law, directed commiſſioners to grant to actual ſettlers certificates of a right to four hundred acres, including their ſettlement. There are many titles under this law to lands in the ſouth weſtern part of this ſtate.

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The act for regulating Fences gives a new and ſummary remedy for treſpaſſes, but takes not away the remedy at common law. And treſpaſs lies though the Fences be not of the deſcription in the act. - - 258-9

FORCIBLE ENTRY AND DETAINER.

See Execution, 5—*Evidence*, 18.
1. Indictment lies for a Forcible Entry into wood-land, within the bounds of a tract poſſeſſed by another. 17

2. To make an Entry forcible, there muſt be ſuch acts of violence, or ſuch threats, menaces, ſigns or geſtures, as may give ground to apprehend perſonal injury or danger, in ſtanding in defence of the poſſeſſion. 17—42
3. Three years peaceable poſſeſſion bars reſtitution, but does not juſtify the offence. - - - 17-8
4. Unleſs there be a poſſeſſion in another, at the time of the Entry, whatever be the force, the Entry is no offence. - - - 43—316—355
5. Surveying land, building cabbins, and leaving them unoccupied, is not poſſeſſing the land. - 316
6. Whether, if there be evidence of poſſeſſion, that evidence be true, is a queſtion of fact to be determined by the jury. Whether the facts proved amount to a poſſeſſion which will be protected againſt a Forcible Entry, is a queſtion of law to be determined by the court. 353
7. A warrant and ſurvey give a right to enter and make the ſettlement required by the act of 1792; but the Entry ought to be peaceable. - - 354
8. A warrant and ſurvey may be ſhewn on the trial of an indictment for a Forcible Entry, as evidence of the boundary of the poſſeſſion. - - 355
9. Having cattle on the land, it has been held, is not being in poſſeſſion. - - 355

Foreign Attachment.

Judgment in a Foreign Attachment is not concluſive. 266

Foreign Money.

See New Trial, 2.

Forgery.

See Evidence, 2.
1. The forgery of any writing which may be prejudicial to another is indictable at common law. 34—45
2. On an indictment for forging a receipt, by adding a further ſum; after conviction, the judgment was arreſted, becauſe the preſumption ariſing from the manner of ſtating the offence was, that the additional ſum was affixed after the name and ſo no man could be deceived by it. - - - - 36
3. It is equally criminal to forge a name, as to forge a ſeal, if there be an intention and poſſibility to defraud. 45
4. Co-obligor may be guilty of Forgery, in aſſigning a note on himſelf and another. But his having it in poſſeſſion may be evidence of authority over it, and if there be no intention to defraud, it cannot be Forgery. 45
5. Strict accuracy, in naming the perſon to be defrauded, is not neceſſary. - - - 111

6. On the trial of an indictment for forging a note, the perſon whoſe name was forged was admitted as a witneſs. - - - - - 246

FRAUD.

See Contract, 6, 13, 15, 16. *Ejectment*, 4.

1. Poſſeſſion is evidence of property, or of a fraudulent colluſion; and he, who gives credit muſt bear the loſs. 379

2. If one give a falſe credit to another, by putting property into his poſſeſſion, the property will, with reſpect to third perſons, be conſidered as accompanying the poſſeſſion. - - - - 379

H

HIGHWAY.

See Evidence, 24.

HOMICIDE.

1. Indictment on the act of 31ſt May, 1718, for the concealment of the death of a baſtard child may be generally for murder, - - - - - 3

2. But under the 17th ſection of the act of 1794, the beſt way is, to frame the indictment ſpecially, 5-8

3. Every unlawful killing is *prima facie* murder; for malice is preſumed, unleſs the priſoner ſhew circumſtances which take away this preſumption. 148—161—257—282

4. Wanton or cruel exerciſe of authority is no extenuation of homicide, but evidence of malice. - 149

5. Paſſion, ariſing from ſufficient provocation, is evidence of abſence of malice, and reduces the homicide to manſlaughter. - - - - 149—161-2

6. Interfering in favour of a friend, reduces the homicide to manſlaughter; but this ought to be, while the perſon of the friend is in danger. - - 149

7. Malice defined. Malice is a queſtion of law. So is Provocation. Court muſt aſcertain the deſcription of the offence, and fix the degree of it, which the facts proved compoſe. - - 148-9—161-2—256-7

8. Paſſion without provocation, or provocation without paſſion, will not reduce the killing to manſlaughter: and, where there is both provocation and paſſion, the provocation muſt be ſufficient. - - 162

9. What is ſufficient provocation? Words or contumelious geſtures are not, if the killing be with a weapon likely to kill. - - - 163

10. Killing on an old grudge, or with a weapon prepared for the purpoſe, is murder. - - 165

11. Killing by a blow in a mutual conflict, without neceſſity either for the protection of life or the poſſeſſion of houſe, &c. is manſlaughter. If neceſſary for ſuch purpoſes, it is homicide in ſelf defence. - 248
12. On indictment for murder, and evidence of only homicide in ſelf-defence, jury may acquit. - 248
13. It ſeems to be the intent of the act of aſſembly, to uſe the diſtinction between expreſs and implied malice, to diſtinguiſh murder of the firſt and of the ſecond degree. 256—282-3
15. Manſlaughter, though diſtinguiſhed into voluntary and involuntary, with reſpect to the puniſhment, remains, in other reſpects here, as in England. - 256
15. Premeditated, unlawful killing is murder in the firſt degree. - - - 256
16. To make killing premeditated, it is not neceſſary, that the deſign ſhould be long formed: it is ſufficient, if the deſign precedes the act. - - 257
17. Drunkenneſs does not incapacitate for forming a deſign of killing, but often ſuggeſts it. But, as it clouds the underſtanding, and excites paſſion, it may be evidence of paſſion only, and of want of malice and deſign 257
18. The homicide is the ſame, though the violence cauſing it be ſmall, and the perſon otherwiſe languiſhing. Shortening life is taking it away. - 282
19. Though murder will be preſumed from unlawful killing, murder in the firſt degree will not be preſumed. 282-3
20. To imply malice, it is not neceſſary, that there ſhould be an intention of killing, if there be an intention to hurt tending to bloodſhed. - - 283
21. Killing, in a mock-fight by conſent, may be but manſlaughter. - - - - 280-3
22. Unlawful killing, with a deſign to kill, is murder in the firſt degree, if with a deſign only to hurt, is murder in the ſecond degree. - - 283

I

Indebitatus Assumsit.

See Aſſumſit.

1. On Indebitatus Aſſumſit for money had and received, brought to recover the price of land ſold, the jury found damages beyond the price. - 22-4
2. On a count for money had and received, the evidence was, that the purchaſer of a houſe mortgaged for a debt had undertaken to pay the debt. The jury was directed to find for the plaintiff. - - 34

3. Indebitatus Aſſumſit for money had and received. Evidence of money paid as difference in an exchange of horſes, and of money received by the defendant on a ſubſequent ſale of the horſe, given by the plaintiff, and that the horſe given by the defendant was ſtolen and reclaimed by the owner, is good evidence to ſupport the action. - - - 271-2

INDIANS.

See Larceny 3.

INDICTMENT.

See Evidence 24. *Forgery* 2.

1. Indictment, as for a mildemeanor, was found and tried for ſtealing a conveyance of land. - 21
2. On an Indictment, found at March ſeſſions, and tried on 14th June, 1792, ſtating the offence on 27th June, 1792, after conviction, judgment was arreſted. 36
3. If an Indictment, which ought not, conclude *againſt the form of the act*, thoſe words may be ſtruck out as ſuperfluous. - - - - 171
4. The words *languiſhing did live*, in an Indictment for murder, are not eſſential, and may be ſtruck out 173
5. Defects in the caption of an Indictment, as *not naming the judges, the jurors, the place, &c.* which might be fatal, if the Indictment were ſo removed into a ſuperior court, may be ſupplied in the court where it was taken, by reference to other records there. - 174-80
6. Indictment for unlawfully, forcibly, and contemptuouſly tearing down, and contemptuouſly refuſing to replace, an advertiſement of a ſale of lands for county taxes. 267
7. Indictment for raiſing a *liberty pole*, during the Inſurrection of 1794. This, as a notorious expreſſion of oppoſition to the government, is an offence. Raiſing a pole in the ſtreet is a nuiſance. - - 275-6
8. Indictment againſt a juror for voluntary intoxication. 290

INSOLVENT DEBTOR.

1. It is no objection to the diſcharge of an Inſolvent Debtor, acting *bona fide*, that he has not reſided in the ſtate two years next before his impriſonment; if he was not reſident in the ſtate at the time of contracting the debt, and at the time of the arreſt. - - 268
2. A debtor diſcharged on the act of Inſolvency in New-Jerſey, and removing into Fayette county Pennſylvania, and after ſix years from his diſcharge, ſued there by a

creditor in N. Jerſey, for a debt ſtated on his petition for diſcharge; pleaded the ſtatute of limitations. The plaintiff had judgment. - - 278

INSPECTION OF FLOUR.

The act for the Inſpection of Flour in the Weſtern counties, adopting the regulations of the act for the Inſpection of Bread and Flour, does not ſeem to adopt all the regulations in the ſupplement to that act. 240-5

INTEREST.

1. A writing for the payment of money, on demand for value received, bears Intereſt only from the demand. 137-8

2. With *legal Intereſt for the ſame* is equivalent to *Intereſt from the date.* - - - 324

J

JUDGMENT.

See Foreign Attachment.

On a warrant of attorney to confeſs *Judgment*, only one Judgment can be entered. - - 268

JURISDICTION.

In an action for the price of land in a foreign country, its title comes incidentally before the court and may be decided on. - - - - 235

JURY.

See Coſts. Forcible Entry, 6. *Settlement of Land*, 8.

1. Jury may find the facts true or not, but cannot ſay, that they are not what the law declares them to be. 160-1—257

2. It is the duty of a Juror to preſerve himſelf in a ſtate fit for doing his duty; and if, while he is attending court for this purpoſe, he incapacitate himſelf by voluntary intoxication, it is an offence. - 290

3. A verdict ought to be given on facts diſcloſed in open court on the trial, not on facts only within the knowledge of any of the Jurors. A Juror knowing facts not proved ought to diſcloſe them and be ſworn as a witneſs. 353

JUSTICE OF THE PEACE.

See Bond, 2. *Warrant.*

1. Whether a Juſtice of the Peace had jurisdiction in an action of debt, for the penalty on the act againſt uſury. 26-7

2. A Juſtice, in an action of debt or demand, ought to ſtate on his record, the ground of action, ſo as to bar another ſuit. - - - 27-8
3. The judgment of Juſtices, in proceedings by landlord to eject tenant, is concluſive only as to facts and the right; and does not prevent an examination of the regularity on a Certiorari. - - 192
4. Proceedings of a Juſtice in an action of debt ſet aſide, becauſe the ſummons ſtated no day of appearance. 272

LAND.

See Evidence, 15. *Settlement of Land. Survey. Warrant.*
1. The title to Land in a foreign country may be examined, if it come incidentally before the court. 235
2. The proprietor or ſtate, as any other owner, may give their Land to whom they pleaſe: but, if they have tied up their hands by a prior engagement, courts of juſtice will hold them to it. - - 251
3. Parties are bound by an agreed line. - 296

LANDLORD AND TENANT.

See Juſtice of the Peace, 3.

LARCENY.

1. Two perſons were intereſted in a bank-note. One handing, or pretending to hand it encloſed in a paper, to the other, in the act of delivery or afterwards, had, it was ſaid, ſecreted or kept it. He was indicted for ſtealing it. The jury were directed, that, if they could preſume, from the circumſtances, that the poſſeſſion was given to the other, it was larceny. If not, and an empty paper was impoſed on him, it was not; but a baſe deceit. 232-3
2. Taking is a material part of larceny; but it may be preſumed from poſſeſſing. - - 321
3. Taking deerſkins hung up in the woods, at an Indian hunting camp, may be larceny. - 388-9

LIMITATION OF ACTIONS.

See Inſolvent Debtor, 2.
Admitting that ſuch a note had been given is not ſufficient to take an action on it out of the ſtatute of Limitations. 291

LOCATION.

See Evidence, 16. *Survey* 5. *Warrant for land* 2.
Land office of 1769 iſſued locations. - 293-4

MALICE.

See Homicide, 3, 4, 5, 7, 8, 9, 10, 13. 16, 17.
1. On an indictment on the act of aſſembly for feloniouſly aſſaulting and beating with intent to diſfigure, ſtronger circumſtances of *malice aforethought* muſt be proved, than if a killing enſued. 29 30.
2. Malice in murder defined. - 148-9
3. Malice may be expreſs, or implied from the circumſtances. - - - - 256
4. Malice, as applied to a malicious proſecution, has, as in murder, a technical meaning. - 270

MALICIOUS PROSECUTION.

See Malice, 4.
Any proſecution, carried on knowingly, wilfully, and wantonly, or obſtinately, not for redreſs, but vexation, is Malicious. - - - 270

MARRIAGE.

See Baron and Feme, 3, 4. *Evidence*, 9, 10, 11.
1. In debt for the penalty, on the ſupplement to the act againſt clandeſtine Marriages, the verdict cannot be for a leſs ſum than 50*l.* - - 214
2. How to declare for this penalty. - 346

MASTER AND SERVANT.

See Evidence, 21, 22, 23.
1. A Mulatto, bound, under the act for the better regulation of Negroes, till the age of thirty-one years, may queſtion the authority; and the indenture is not concluſive evidence of the circumſtances neceſſary to ſupport ſuch binding. - - - 264-5
2. But ſuch indenture executed by the overſeers of the poor, with the conſent of two juſtices, is good till the age of twenty-one, if a male, or of eighteen, if a female. 264-5
3. An advertiſement, for apprehending a runaway apprentice, is a general authority to apprehend him, but he, who acts under it, acts at his peril. - 325
4. The act of aſſembly for regulation of apprentices takes not away any Common Law remedy. 325

MORTGAGE.

1. A conveyance may be conſidered as a Mortgage, though the defeaſance be on a ſeparate paper. 357
2. But it may be conſidered abſolute, according to the intention of the parties. - - 357-8

3. A man going into poſſeſsion under a contract is not to be conſidered as a treſpaſſer; but may claim for improvements. - - - 358

NEW TRIAL.

1. New Trial granted becauſe the verdict was againſt an award. - - - 230
2. New trial granted for a miſtake in the value of foreign money. - - - - 267

PARTNERS.

1. One partner cannot bind another, by admitting, in the ſettlement of an account due by a debtor to the partnerſhip, an account due by himſelf only, as a ſet off. 259 60
2. But if he ſell part of the goods, as a payment of his individual debt, the other partner is bound by his act; and the purchaſer from the partnerſhip is diſcharged. 260
3. In a ſuit againſt one partner, for a partnerſhip debt, a receipt by the plaintiff to the defendant *alone*, though not ſufficient to contradict the evidence given of a partnerſhip, is a good ſet off againſt the partnerſhip debt, the defendant being ſued alone. - 292

PAYMENT.

See Baron and Feme, 5, 6. *Bill*, 2, 3. *Mortgage* 3.
If money be made payable in grain, at a fixed price, and the grain riſe in value, the value of the grain at the time of delivery, with intereſt from that time, is the meaſure of damages. - - 346-7

PENALTY.

See Admiralty. *Bond* 2. *Juſtice of the Peace* 1. *Marriage*, 1, 2.

PLEADINGS.

See Executor, 1, 2. *Inſolvent Debtor*, 2. *Marriage* 2.
Defective declaration may be cured by verdict, though it might have been bad on demurrer. 59-114—117-8

RAPE.

1. Penetration ſeems the eſſence of this offence, as completing the violence done to the perſon and feelings of the woman. - - - 143
2. The priſoner, having been acquitted on an indictment for a rape, was, by conſent, tried by the ſame jury for a burglary laying a breaking, entering, and rape, (the ſame rape of which he had been acquitted). He was acquitted. - - - 144

RECORDING OF DEEDS.

A conveyance of an improvement claim, if it be not recorded, will be considered as fraudulent against a subsequent purchaser. - - - 43-4

RENT.

See Payment.

Replevin, it seems, will not lie for indefinite rent, consisting of repairs, a kind of personal duty. 347

REPLEVIN.

See Rent.

1. Replevin lies for a chattel sold, and even by the assignee of the buyer against the seller. - 134-5
2. Does Replevin lie, by a third person, whose goods are taken in execution? - - 301-4
3. But if the officer leave the goods in the hands of the owner, and enable him by possession to transfer them to a third person, this is not the case of goods taken in execution; and the Replevin by this third person will not be quashed. - - - 301-4

REVENUE.

See Contract, 9, 10.

1. The duty on stills and distilled spirits is demandable, though there be no Inspection office in the district prescribed by law. - - - 314
2. The existence of an Inspection office is necessary only for demanding the penalty for not entering. 314
3. Both penalty and duty may be demanded. - 314
4. To entitle a distiller to his election of paying according to the quantity of spirits distilled, his book must be shewn regularly kept according to the terms of the act. 314

RIOT.

See Evidence 18.

1. To make one a party to a riot he must be active either in doing, or countenancing or supporting; or ready, if necessary, to support the unlawful act. 191—281-2
2. But those who stand by, without endeavouring to prevent or restrain a breach of the peace, are to blame; and if the passions of the injured person so mislead his judgment, as to prosecute them as parties, their fate is not to be regretted. - - - 191
3. Collecting a party, for any purpose of a violent tendency, renders the authors guilty of all consequences plainly to be foreseen. - - 277

4. It is a Riot, if a number of perſons aſſemble in a town in the dead of night, and by noiſe, or otherwiſe, diſturb peaceable citizens. - - 277
5. If perſons aſſemble together, for an unlawful purpoſe, each of them is guilty of all acts done in execution of, or contributing or tending to that purpoſe. If they meet for a lawful purpoſe, and proceed to an unlawful act, it is a Riot. - - - - 277
6. If no more than one be concerned in the unlawful act, all muſt be acquitted on an indictment for a Riot. 337

Settlement of Account.

Settlement is *prima facie* evidence of the fairneſs of the items and of the balance being due; but not always concluſive. - - - 260—344

Settlement of Land.

See Ejectment, 2.—*Evidence*, 18, 19, 20.—*Survey*, 5, 6.
1. Actual Settlements were protected againſt warrants, before the law of December, 1786. - 54—255
2. An improvement, conſiſting of an unfiniſhed cabbin and rails cut, gives no title to land, as a Settlement does. 251
3. Though a Settlement may intitle the ſettler to the quantity uſually ſurveyed, he may limit his claim to a leſs quantity; and if he do, and another procure a title for the adjoining land, the ſettler is bound by his own limitation. - - - 274
4. Actual Settlement defined. - - 335
5. Claimant of land by Settlement, having *made*, is excuſed from *continuing* his Settlement for five years, if he be driven away by the enemies of the United States.—Claimant by warrant is excuſed from *making* his Settlement within two years, if he be prevented by the enemies of the United States. - - 336
6. There are two ſorts of ſettlers; ſettlers under warrants, and ſettlers without warrants. - - 336
7. Warrant is preferred to an adverſe Settlement made ſubſequent to its entry. Settlement completed previous to entry of warrant is preferred to warrant. - 336
8. Settlement is a queſtion of law and fact; whether ſuch acts were done is a queſtion of fact; whether ſuch acts make a Settlement is a queſtion of law. - 339
9. It ſeems the beſt opinion, that no man without a warrant can claim land by a Settlement made by an agent; it being the intention of the law, that the claimant by ſettlement ſhould himſelf reſide on the land. 340
10. There can be no title by Settlement without an actual reſidence on the land. - - 342

SLAVE.

See Evidence, 29. 31.—*Maſter and Servant.*

A Slave, brought from another ſtate into the counties of Weſtmoreland and Waſhington, after 23d September, 1780, by a man not then an inhabitant of thoſe counties, is, as if brought into any other part of the ſtate after 1ſt March, 1780, free. - - 284—90

STIPULATION.

See Admiralty.

SUBMISSION.

See Award.

Submiſſion is revocable before the award or hearing.—Sale of land conſidered as a revocation of a Submiſſion previouſly entered into. - - 308-9

SURETY.

See Admiralty—Execution, 4.—*Warranty*, 1.

SURVEY.

See Evidence, 19.—*Settlement*, 4, 5, 6, 7.—*Warrant for Land*, 3.

1. The act of 8th April, 1785, makes void a Survey made before a warrant. - - 53-4
2. But it ſeems this act extends not to any land out of the *New Purchaſe*. - - - 54
3. A Survey cannot be given in evidence, unleſs a warrant authoriſing it is produced. - - 130-1
4. If a ſurvey be made on land not ſo well anſwering the deſcription in the location, and ſubject to a prior title, it may be waved, and a new Survey made on land anſwering the deſcription, if no other title intervene; and it lies not in the mouth of another to ſay, that the owner of the location had, in the mean time, ſold it. 250—309
5. If a Survey be made on a warrant or location, a ſettlement made afterwards on the ſame land gives no right. 218-19—300
6. A ſurveyor, if juſtifiable, cannot be compelled, under the act of 1792, to ſurvey land for a ſettler, unleſs he has made an actual ſettlement. - - 335
7. If a Survey have been made by a public officer, a ſubſequent private Survey cannot be given in evidence, the party ought to have applied for a re-ſurvey. 359

TRESPASS.

1. Treſpaſs for killing a dog. A perſon not acting improperly may kill a dog dangerous to him. 215

2. In Treſpaſs for meſne profits an innocent poſſeſſor may ſet off improvements. - - 215—358
3. If fences, though not what are called *lawful*, be what are called *neighbourly*, and ſufficient to keep out cattle not *breachy*; Treſpaſs will lie, for an injury by the cattle of another. - - - 259
4. Whether Treſpaſs lies againſt a conſtable, by a third perſon, whoſe property was taken in execution on a warrant againſt one to whom the property was given in poſſeſſion by the owner? - - - 376-9
5. Whether Treſpaſs or Trover be the proper remedy for an owner, for a taking of his goods out of the hands of a third perſon. - - - 376-9

TROVER.

See Treſpaſs, 4, 5.
1. Demand and refuſal is but evidence of converſion; and, if converſion can be proved otherwiſe, they need not be proved. - - - 153
2. The ſtatute of limitations operates from the converſion. 153-4

TRUST.

See Warrant for Land, 2.
1. A man having ſold land, and received the price, is a Truſtee for the buyer, while he holds the title. But, if he afterwards convey to a *bona fide* purchaſer for a valuable conſideration without notice, the laſt purchaſer will hold the land diſcharged of the Truſt. 349
2. If the ſubſequent purchaſer had notice of the previous ſale, he is ſubject to the Truſt. But, if he convey to a *bona fide* purchaſer, without notice and for a valuable conſideration, the laſt purchaſer will hold diſcharged of the Truſt. - - - 349

USURY.

See Juſtice of the Peace, 1.
If, beſides intereſt, a certain gain be reſerved, it is Uſury: but, if it be doubtful whether it may not be a loſs, it is not Uſury. - - - 125-6

VARIANCE.

See Executor, 1, 2.
1. In a forgery, writing *Randole* for *Randall*, is the ſame for all purpoſes of deception. - - 45

2. Indictment for forging a receipt for the uſe of *H. Briſon*. The receipt produced was for the uſe of *H. Priſon*. The jury were directed, that they might read it as it was intended, or find a ſpecial verdict. No judgment could be given on the ſpecial verdict. - 141-2
3. A diſcharge or acquittal for this Variance will not diſcharge from another indictment, for the ſame offence, correcting the Variance. - - 142

WANT OF CONSIDERATION.

See Evidence, 5, 6.—*Payment*.

WARRANT.

Warrant by a juſtice of the peace not directed to any particular perſon or officer, will not juſtify the execution of it. - - - 376

WARRANT FOR LAND.

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REPORTS.

ERRATA.

Page 87, line 6 from top, read *taylor* inſtead of *tylor*.
—— 145, —— 16 from top, read *plaintiff*———*defendant*.
—— 227, —— 18 from bottom, read *diſpoſed*———*dipoſed*,
—— 377, —— 3 from bottom, dele *alone*, where it occurs the ſecond time.

CHARGES

CHARGES

TO

Grand Juries

OF THE

COUNTIES OF THE FIFTH CIRCUIT,

IN THE

STATE OF PENNSYLVANIA.

BY ALEXANDER ADDISON,

PRESIDENT OF THE COURTS OF COMMON PLEAS
OF THE FIFTH CIRCUIT.

WASHINGTON:

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IN PHILADELPHIA.

1800.

PREFACE.

TO thoſe, who, after their peruſal, may think it requires an apology, to have delivered the following Eſſays, as Charges to Grand Juries, or now ſo to publiſh them, I have nothing to ſay that would be ſatisfactory.* Perhaps I have too much flattered myſelf, in ſuppoſing it poſſible, that they may be uſeful. They were all written at the times ſtated. And the man muſt be wiſe or inſenſible indeed, of

* A ſtronger evidence of a diſpoſition in ſome men, to monopolize the direction of public opinion, can hardly be given, than the harſh cenſures which have been propagated on what are called *Political Charges*; nor of the depravity of public opinion, than the approbation with which thoſe cenſures have been received. While ſo many ſet themſelves up as political inſtructors, and, in this capacity, with all the confidence, induſtry, and zeal of inſpired miſſionaries, preach error and ſedition; it would ſeem hard, if men whoſe education, habits, and experience, may have qualified them to think juſtly on public affairs, ſhould be condemned to ſilence; or, while interpoſing their ſentiments againſt the torrent of

whom the experience of ſeven years, in a period of moſt intereſting novelty, varies no ſentiment, and corrects no judgment.

deluſion, deny them the ſolemnity of a public ſtation. I flatter myſelf, that ſuch cenſures come not from the wiſeſt and beſt part of the community: and I feel great conſolation in the following teſtimony againſt them.

Copy of a Letter from General Waſhington.

Mount Vernon, 4th March, 1799.

SIR,

YOUR favour of the 31ſt of January, encloſing your Charge to the Grand Juries of the County Courts of the Fifth Circuit of the State of Pennſylvania, at the laſt December Seſſions, has been duly received, and for the encloſure I thank you.

I wiſh, ſincerely, that your good example, in endeavouring to bring the People of theſe United States more acquainted with the Laws and Principles of their Government, was followed. They only require a proper underſtanding of theſe to judge rightly on all great national queſtions; but unfortunately, infinite more pains is taken to blind them by one deſcription of men, than there is to open their eyes, by the other; which in my opinion, is the ſource of moſt of the evils we labour under.

With very great eſteem, I am, Sir,

Your moſt obedient Servant,

GEORGE WASHINGTON.

Alexander Addiſon, Eſq.

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CHARGES

CHARGES.

ERRATA.

Page 137, line 27 from top, read *or* instead of *of*.
—— 140, —- 30 from top, read *to* ——— *from*.
—— 162, —- 26 from top, read *arts* ——— *acts*.
—— 184, —- 10 from top, read *despaired of* ——— *despaired*.
—— 231, —- 16 from top, read *ought* ——— *out*.

CHARGES, &c.

No. I.

The Judicial Conſtitution of Pennſylvania.

A CHARGE to a grand jury was, no doubt, introduced, and is properly intended, to aſſiſt them in that duty, to which they are called by their country. But, as topics of this kind are often abſtract or technical, digreſſions, in ſubjects foreign to the occaſion, are frequently, and not unprofitably indulged. Under this indulgence, I may now be allowed to take a view of the judiciary ſyſtem, which the conſtitution of our ſtate has eſtabliſhed for the ſeveral counties; caſting, at the ſame time, a comparative glance upon that ſyſtem, the place of which it has taken. And I have the better claim to this allowance, becauſe the ſubject, intereſting in itſelf, and not altogether unſuitable to the principal purpoſe, can never again be ſo properly introduced. *September Seſſions, 1791.*

That a people, who have long ſubſiſted in a natural ſtate, unaſſiſted by calamity, ſhould voluntarily ſit down, and trace back their progreſs from the firſt rudiments of ſociety, diſſolve every band that held them together, eradicate every prejudice, reſpectable from time and habit, and by the force of reaſon, enlightened by the ſpeculations and experience of ages, eſtabliſh a ſyſtem of political freedom, is a ſpectacle reſerved for the eighteenth century, reſerved for America to ſet an example to the nations of the earth, and worth the diſcovery of a new world to exhibit.

Sept. Seſſ. 1791.

The late change in the conſtitution of Pennſylvania, in many reſpects material, is, in my eſtimation, ſo material in none, as in that part of it which relates to the courts of law. The adminiſtration of juſtice being that part of government, which moſt nearly, and moſt frequently affects us, the courts, to which it is committed, ought to be ſo conſtituted, as, in the higheſt degree, to deſerve our confidence.

That this be attained, their deciſions muſt be impartial, uniform, and according to law.

Law is a ſcience, the right underſtanding of which requires general knowledge, much ſtudy, and cloſe reflection. Without theſe, it never can be known. And, to know it intimately, will require the labours of half a life.

A court of law, without the knowledge of law, might, had we never known it to exiſt, have appeared to us an abſurdity too glaring, to have place in a free country.—For freedom cannot ſubſiſt without law. And law, ignorantly, partially, or uncertainly adminiſtered, like every abuſed conſtitutional power, is the worſt kind of tyranny.

In framing the preſent conſtitution of the county courts in this ſtate, both former uſage, and a deſire of an improved and enlightened adminiſtration of juſtice, had an evident influence; and thus, like a body impelled by two forces, moving in different directions, it has taken the courſe of neither, but a middle one, as nigh to each, as the force of the other would permit.

To have compoſed theſe courts entirely of men, lawyers by profeſſion, would, unleſs ſuch judges had been few, have appeared a meaſure too expenſive. If they had been few, they might have poſſeſſed leſs confidence, or been liable to more caſualties. At all events, this arrangement might have been conſidered as too great a deviation from the former ſyſtem: and therefore, to conſtitute even a profeſſional judge for each county, was not attempted.

To leave the courts unaltered, was liable to ſo many objections, that no doubt could exiſt, that ſome improvement was neceſſary.

It was eaſily agreed, that one man, by profeſſion a lawyer, ſhould be allotted to a circuit of ſeveral counties,

as preſident of the courts in all. And it then became a queſtion, whether one man, not a profeſſional lawyer, in each county of the circuit, ſhould be aſſociated with him, and all be judges in every county therein, or whether three or four ſuch men ſhould be aſſociated with him in each county, as judges for that county only. The firſt method would have been the beſt. The laſt was conceived to be the moſt acceptable; and was accordingly adopted. *Sept. Seſſ.* 1791.

Theſe judges, beſides integrity of heart, and decency of demeanor, are preſumed to poſſeſs firmneſs without obſtinacy, modeſty without flexibility, diſcretion without timidity, knowledge without conceit, and judgment without preſumption. Theſe qualities blended with that ſkill of the law, which the preſident is ſuppoſed to have acquired, from ſtudy and practice in his profeſſion; and which the aſſociate judges are ſuppoſed to acquire, by their future attention and experience, may, it is preſumed, conſtitute a tribunal, from which the benefits of a court of juſtice may be expected, and in which the powers of a county court may be lodged.

Theſe powers are important. Under the former conſtitution, ſome juſtices of the court of quarter ſeſſions and orphans court were not juſtices of the court of common pleas; and ſome juſtices of the court of common pleas were not juſtices of the court of quarter ſeſſions and orphans court. Now the preſident, and all the judges of the court of common pleas are, under that name, and by virtue of that appointment, alſo judges of the court of quarter ſeſſions and orphans court; and, together with the regiſter, judges of the regiſter's court, within their reſpective counties.*

Further, by the preſent conſtitution, certain powers, formerly exerciſed by the juſtices of the ſupreme court only, are now, concurrently with them, veſted in the judges of the courts of common pleas. Within their reſpective counties, they are juſtices of oyer and terminer, and gaol delivery, and, the preſident being one, may try capital and other offenders;† and they have alſo, therein, the like powers with the judges of the ſupreme

* *Conſtitution, Art.* v. § 7.—† *Art.* v. § 5.

Sept. Sess. 1791.

court, to iſſue writs of *certiorari* to the juſtices of the peace, and to cauſe their proceedings to be brought before them, and the like right and juſtice to be done.*

A new proviſion, important to liberty, is made by this conſtitution, that no commiſſion of *oyer* and *terminer*, or *gaol delivery*, ſhall be iſſued.† In other countries, there have been inſtances, where the government, having marked out ſome perſons as objects of revenge, and deeming the judges in ſtanding commiſſion unfit tools of its malice, has iſſued ſpecial commiſſions of *oyer* and *terminer*, or *gaol delivery*, to individuals, ſingled out for the purpoſe, who, after ſerving the preſent turn of oppreſſion, might ſhrink from the public notice, and be obſcured in the maſs of the people. It is not neceſſary to trace the records of the Baſtile or the Inquiſition for victims of legal tyranny: the hiſtory of England itſelf, ſo juſtly famed for the freedom of its laws, will afford examples. Next to a trial by Jury, it is eſſential, that the judges who are to decide on the life or liberty of any citizen, be known, and be appointed for all alike. This is ſecured to the citizens of this ſtate; for no commiſſion of *oyer* and *terminer*, or *gaol delivery* iſſuing, and the judges of the ſupreme and county courts having the authority of ſuch commiſſions, by virtue of their offices; no man can be puniſhed or condemned, but by judges, who have a judicial character to ſupport, and an office to loſe.

The judges of the courts of common pleas, being judges in appeals, in actions of debt or demand not exceeding ten pounds, the individual juriſdiction of deciding ſuch actions is left, as before, with the juſtices of the peace. But all powers of a juſtice of the peace, ſo far as relates to criminal matters, are given to the preſidents, within their reſpective circuits, and to the judges within their reſpective counties.‡

Deriving their appointment from the governor,‖ not as before, from the people; and holding their commiſſions during good behaviour, they are freed from all bias or partiality, ariſing from motives either of gratitude for the paſt, or fear for a future election. And

* *Conſt. Art.* VIII. § 8. † *Art.* IX. § 15. ‡ *Art.* V. § 9. ‖ *Art.* V. § 4.

being thus called forth, by the voice of the whole commonwealth, not of any particular part of it, they are equally related to all. *S. M. Sess.* 1791.

It is not, I believe, saying too much for the county courts eſtabliſhed by our conſtitution, to pronounce, that they exhibited the beſt ſyſtem of county judiciary then exiſting in the Union; and it is known, that they have already ſerved as a model for a ſimilar ſyſtem, in a neighbouring and very reſpectable ſiſter ſtate.*

That theſe courts are compoſed of a fixed and ſmall number,† is a matter of greater conſequence, than may at firſt appear. There is a delay attending the deliberations of many, and a difficulty in reconciling their various ſentiments, and bringing them to unite in one point. But delay and difficulty are not the only inconveniencies. The buſineſs committed to many, is often done in a careleſs and ſlovenly manner. A trite maxim, that "what is the buſineſs of every man, becomes the "buſineſs of no man," has ſeldom been better verified, than in our county courts. The judges being ten, twelve, or twenty in number, any three of whom could conſtitute a court; being appointed only for ſeven years; and receiving no compenſation for their attendance in court; each thought himſelf at liberty, to purſue his own amuſement or other avocation; becauſe there was a ſufficient number, without him, to compoſe a court. If a court was compoſed, thoſe, who, by accident, were on duty, thought themſelves intitled to a ſimilar relief; and laid hold of the firſt opportunity, and perhaps not a ſeaſonable one, to enjoy that relief. Thus they acquired not that ſkill, which might have reſulted from a conſtant attendance; the buſineſs was delayed, by each endeavouring to throw it on another; and, ſtrange as it may ſeem, it ſometimes happened, that, after ſeveral ſets of juſtices at the hearing of a cauſe, it was, at laſt, decided by thoſe, not one of whom had heard the whole.

Theſe faults, egregious as they are, muſt be imputed to the laws, rather than to the men: for they were the natural conſequences of the conſtitution of our courts. The courts conſiſted of too many members, and the

* *Maryland.* † *Conſt. Art.* v. § 4.

Sept. Seſſ. 1791.

members were appointed for a limited time, and received no reward. Thus, no individual feeling any intereſt or peculiar obligation, the ſenſe of duty was not ſo diſtinct and keen, as to have a regular, certain, and juſt operation; though in ſome (and it will be remembered to their honour) under all their diſcouragements, it had.

It is the duty of every ſtate to fill the offices of government with men qualified for the neceſſary duties.— If thoſe duties require time, talents, or labour, it is neither juſt nor reaſonable, to expect, that they ſhould be fulfilled, without an adequate compenſation. A general ſervice every man owes to the public. A particular ſervice to the public, without wages, no man is bound to beſtow. It is therefore the duty of the government to allot to every man, who is called into ſuch public ſervice, a compenſation adequate to that ſervice, which he is called to perform. If this be a duty of the government, it muſt be performed, though its performance may occaſion expence.

Each ſtate, whether of nature or civil ſociety, has its advantages and diſadvantages. In a ſtate of civil ſociety, courts of juſtice are neceſſary. Being not only neceſſary, but important, they ought to be made as perfect as poſſible; and, to attain this degree of perfection, and enſure a regular and proper exerciſe of their powers, expence is neceſſary.

The county courts having immediate and important influence upon our intereſts, it was thought, that every obligation and inducement ought to be laid upon the judges, to do their duty, and to do it well. And this, it was preſumed by the preſent conſtitution, would be effected, by reducing them to a ſmall and fixed number,* giving them commiſſions during good behaviour,† and allowing them ſalaries.‡

The judges now allotted to every court are not more, perhaps, than are ſuppoſed neceſſary, to enſure confidence in their deciſions. They are ſo few, that they can be eaſily, diſtinctly, and generally known, and that the abſence of any one will be inſtantly obſerved. Each of them will have reaſon to ſuppoſe, that his preſence

* *Conſt. Art.* v. § 4. † *Art.* v. § 2. ‡ *Ib. and* 3*d St. L.* 88.

may be neceſſary at court; and, being there, will be ashamed to be abſent from his place. Thus every one will feel himſelf a neceſſary member of the court, and be prompted to do his duty. *Sept. Seſſ.* 1791.

But every one will be prompted alſo to do it well.—For ſeeing no other end of their commiſſions, but the end of their lives; and being no longer bound to beſtow their time and ſervice, for the benefit of the public, without a compenſation; but receiving ſalaries, to compenſate for their time and labour devoted to the community; their office becomes a calling or occupation, and, as ſuch, their particular attention to its duties is expected and required; and not immediate attention only, but a competent preparation, by ſtudy and reflection, for an intelligent diſcuſſion, and right deciſion of the queſtions which may come before them.

Theſe queſtions being, as we have ſeen, ſo greatly enlarged, in number and importance, beyond the ſubjects which compoſed the juriſdiction of the former county courts; and a new arrangement and reformation of the whole ſyſtem being intended; a neceſſity aroſe of allowing ſalaries to the judges of thoſe courts ſo reformed; and theſe ſalaries will bring upon the ſtate an annual expence of about five thouſand pounds.

Such a ſum, expended on an article, which, before coſt us nothing, may appear large. But let it be remembered, that, divided among the taxable inhabitants, it will little exceed the proportion of a ſhilling to each; and that it is ſmall, in compariſon to what is paid in ſome other countries. The amount of the ſalaries of all the judges, both of the ſupreme and county courts, in Pennſylvania, is nearly eight thouſand pounds. The ſalaries of all the judges in Scotland, amount to forty-two thouſand ſix hundred and ſixty-ſix pounds; and in England, to fifty-eight thouſand five hundred pounds, beſides thoſe to judges of local juriſdiction there, and not reckoning the judges in chancery, and inferior officers in both kingdoms. Thus the ſalaries of the judges under the crown of Britain, excluſive of thoſe of Wales, Ireland, and the foreign dominions, exceed an hundred thouſand pounds of our money; more than three times as much as the whole expences of our go-

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vernment: while the ſalaries of the judges of all the courts of Pennſylvania, are not equal to the ſalary of the chief juſtice of England alone; and would not fit out a ſingle ſhip of the loweſt rate, of the Britiſh navy.

But it is leſs material what proportion the expence, incurred by the preſent arrangement of the courts, may bear to that of ſimilar inſtitutions in other countries.—The principal conſideration is, that it is, as I have ſtated, the effect of public duty, and may produce an adequate advantage to thoſe who bear the burden.

It may be doubtful whether it is worſe, to have no law, or to have law altogether uncertain. Uncertainty of law makes a miſerable ſlavery. Yet uncertainty was the natural reſult of the former conſtitution of our county courts. The juſtices, continually changing, could not acquire a knowledge of the law; and, therefore, could not make it the rule of their deciſions. The ſame perſons ſeldom ſitting together in the ſame court, and different courts having no mutual communication; their deciſions could not operate as precedents, to eſtabliſh any fixed rule to each other or to themſelves. Thus, left like mariners on the ocean, without compaſs, ſtar, or land-mark, they ſteered at hazard; and there might be a different law on the ſame ſubject, in every county in the ſtate, and in the ſame county, at different times.

That the law ſhould be the ſame, and uniformly adminiſtered, in all the courts, is of great conſequence, to promote its knowledge, prevent diſpute, and give equal advantage to all parts of the ſtate. This will be effected, by the diviſion of the ſtate into circuits, conſiſting each of ſeveral counties, of all the courts of which one man is preſident. The rules of practice and deciſion in all the courts of each circuit, will thus be as of one court. In this view, we may be allowed to compute only five county courts in the ſtate. It is much eaſier to introduce and eſtabliſh an uniformity in five courts, than in twenty-one. From this circumſtance, and from the eaſy method of communication between the preſidents of all the circuits, eſpecially when we conſider, that they are all judges of the high

court of errors and appeals*; we may expect, that the rules and practice of the law of Pennſylvania will be, every where, the ſame, certain, and known. *Sept. Seſſ.* 1791.

The ſame principles, rules, and deciſions thus governing every court in the ſtate; the judges of the courts of common pleas diſcharging their duty in a faithful, regular, and intelligent manner, and every day making improvements by ſtudy and experience; there will naturally be produced in the ſuitors an acquieſcence in the legality of their deciſions, and a confidence in their juſtice and utility: From this it will follow, that fewer cauſes will be removed into the ſupreme court. Thus ſuitors will gain, by having their cauſes decided with leſs coſts. The public, alſo, will gain by it: for, by degrees, courts of *niſi prius*, held by judges of the ſupreme court, in circuits throughout the ſtate, will be leſs frequent, or ſhorter: and being thus leſſened, in number or duration, their expence will be reduced.

The great delay in the diſpatch of public buſineſs, in the former county courts, ſo much complained of, will be leſſened, if not removed. Rules, it may be expected, will be formed to govern legal proceedings, which, being general, uniform, leſs variable, or fixed, will become known to all, and will guide all. Cauſes will not be hung up ſo great a length of time; there will be more certainty of trials. Juries will not attend from Monday till Saturday, without buſineſs; but will either find employment, or be diſcharged. And ſuitors and witneſſes will not attend courts ſo often and ſo long, and yet in vain.

It is not eaſy to conceive how great a ſaving, to the people of a county, may be made in this way. The expence and loſs of time, in preparing for, going to, attending at, and returning from courts, and all to no purpoſe; this happening to a great number of people, and being repeated too, in a variety of inſtances; to ſay nothing of the habits of idleneſs, diſſipation, and debauchery frequently formed in this manner; muſt conſtitute a very important poſitive loſs to a county, which it will hereafter be incumbent on the courts ſeriouſly to endeavour to leſſen or prevent.

* *St. L.* 97.

Sept. Seff. 1791.

The enlargement of the powers of the county courts will have no little effect on their utility and importance. Their juriſdiction in criminal law is no longer confined to offences of an inferior order, but extends to all crimes, even thoſe of the deepeſt guilt, and heavieſt puniſhment.

Independent of the dignity thus added to theſe courts, and the confidence in their deciſions, which will flow from it; advantage will reſult from this increaſed juriſdiction, both to the unfortunate objects of it, and to the public.

The public will derive benefit from this: for it will leſſen the number and expence of courts of *oyer* and *terminer*, and *gaol delivery*, held by judges of the ſupreme court, in the ſeveral counties. The time and expence of detaining priſoners will thus alſo be leſſened. Puniſhment, more immediately following the crime, (a point of great importance in criminal juriſprudence,) will appear more cloſely connected with it: and the ſufferer, inſtead of ſeeming only an object of compaſſion, as he ſeems, in proportion to the interval between his crime and his puniſhment; becomes, as it is intended that he ſhould be, an example of the fatal effects of guilt, a monument of public juſtice, and a terror to thoſe that do evil.

The unfortunate objects of this new juriſdiction will alſo derive benefit from it, whether they be innocent or guilty: for a ſpeedy trial is due to both. Formerly, the perſon accuſed of a crime, of which the judges of the ſupreme court alone had cognizance, though innocent, was, perhaps, confined to a loathſome priſon, under the preſſure of ignominy, perhaps of want, and the fear of death, for twelve long months or more; before his fame could be cleared, and his fears diſpelled by an acquittal. Nor could the guilty priſoner enjoy the melancholy ſatisfaction of ſpeedily terminating his anxiety, his guilt, and his miſery in this world, by the puniſhment annexed to his crime. But ſuffering, every day, the anguiſh of a thouſand deaths, he, at laſt, became habituated to his ſtate of miſery, and the reflections of a guilty conſcience, and met the final execution of the law, a more impenitent and obdurate ſinner, than when his courſe was firſt arreſted by its power.

Yet it might ſeem hard, that a man, whoſe life is at

ſtake, ſhould not have it in his power to reſt the deciſion of his fate, on the diſcernment and knowledge of the higheſt tribunal, which the ſtate has eſtabliſhed, and the moſt remote from any ſuſpicion of bias. This power is reſerved to him: for under regulations preſcribed by la..,* he may remove the indictment and proceedings into the ſupreme court.† *Sept. Seſſ.* 1791.

Another ſource of advantage, from the preſent conſtruction of the county courts, is in the power which it gives to the judges, within their reſpective counties, equal to that of the judges of the ſupreme court, to iſſue writs of *certiorari* to the juſtices of the peace, and to cauſe their proceedings to be brought before them, and the like right and juſtice to be done.‡

This authority veſts in the county courts all the controul, which the ſupreme court had by *certiorari*, over the proceedings of juſtices of the peace within their reſpective counties. This may be in matters either criminal or civil.

A forcible entry into, or detainer of land, is an offence, which, by certain Engliſh ſtatutes,‖ extended by conſtruction and practice to this country, might (and yet may) be enquired into, and puniſhed by juſtices of the peace, ſitting out of court. The only method, under the former conſtitution, of ſtaying or correcting their proceedings, was by *certiorari*, iſſued from the ſupreme court, and returnable there. This method was vexatious to the party ſuffering by the delay which it occaſioned, and expenſive to both parties.

A juſtice of the peace may hear and determine actions of debt or demand, not exceeding ten pounds; and his judgment, however irregular or unjuſt, if not appealed from in ſix days, or if under forty ſhillings, was, during the former conſtitution, concluſive on the parties; unleſs the proceedings were removed by *certiorari* into the ſupreme court: a remedy, which, to the diſtant counties, might be worſe than the diſeaſe.

Proceedings on forcible entries and detainers, before juſtices of the peace, are of great conſequence; becauſe they may change the poſſeſſion of land of the higheſt

* 3 *St. L.* 94.

† *Conſtitution, Art.* v. § 5. ‡ *Art.* v. § 8.

‖ 15 *Richard* II. *c.* 2. 8 *Henry* VI. *c.* 9. 31 *Eliz. c.* 11. 21 *James c.* 15.

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value and improvement. An action of debt under forty ſhillings, may, on account of its comparative magnitude, with reſpect to the eſtate of the parties, be of as much weight to them, as an action of a thouſand pounds value to others. And one falſe rule of judgment applied by a juſtice to one action under forty ſhillings, or ten pounds, becomes of conſequence, when it is alſo applied to all other actions of the kind, which come before him. To leave theſe caſes, therefore, without a remedy, or only with one productive of perhaps equal inconvenience, was ſurely improper and unreaſonable: it amounted to a denial of juſtice.

Juſtices of the peace, being called forth, without any preparation, from the ordinary occupations of an active life, cannot be ſuppoſed qualified to decide on nice and important queſtions of law. Having been called forth only for the ſhort period of ſeven years, they had but little inducement to endeavour to acquire thoſe qualifications neceſſary for a right diſcharge of the duties of their office. And being left, without any ſalary, dependent, for permanent ſubſiſtence and advancement in life, on their uſual occupations, it cannot be ſuppoſed, that they ſhould beſtow that time for the acquiſition of thoſe qualifications, which would be requiſite. Theſe circumſtances, though now ſomewhat improved, ſuppoſing a ſufficient number of men of good underſtanding and diſpoſition, to chooſe from, and a proper choice to be made, and making no allowance for thoſe partialities, which, in a ſmall neighbourhood, and narrow juriſdiction, even the beſt men cannot totally ſhake off; render the execution of this office in all its parts, without many errors, not a little difficult. Hence aroſe the neceſſity, a neceſſity which, notwithſtanding the improved ſtate of the office of juſtice of the peace, may ſtill exiſt, of making the road to relief as ſhort and as eaſy as poſſible, by an application to the county courts. And this, attended with far leſs delay and expence, is not leſs effectual, than the former application to the ſupreme court.

As it will thus become the duty of this court to protect every citizen, from every erroneous proceeding of any juſtice of the peace, within its juriſdiction; ſo it will it be our duty and our pleaſure, to aſſiſt and ſupport in

the right exercife of his authority, every gentleman, who ſteps forward to ſerve his country in this honourable and uſeful office. And we expect, in return, that they will concur, mutually and heartily with us, each in his proper ſphere, for the preſervation of the peace and adminiſtration of the juſtice of Pennſylvania; and for giving full effect to the preſent diſtribution of judicial authority, and the improved view of the conſtitution and laws of our country; that it may appear, that we labour not in vain, and that the truſt repoſed in us is neither miſplaced nor abuſed. *Sept. Seſſ.* 1791.

Having a perfect acquaintance of the ſentiments and diſpoſition of the gentlemen of the bar, I am enabled to give aſſurance, that we may rely with full confidence on every aid from them, in accompliſhing thoſe eſſential purpoſes of our inſtitution; and that no effort of theirs will ever be wanting, to improve the practice and proceedings of the courts, for the attainment of ſpeedy and effectual juſtice.

Courts have a ſummary authority over their officers, and it is their duty to exerciſe it, ſo as to give to their proceſs and judgments a certain and proper effect.— From ſheriffs and coroners, therefore, it will be expected and required, that every writ and order of this court ſhall be executed with preciſion, readineſs, and impartiality; that money ſhall never be retained, nor be diverted from its regular courſe; and that no opportunity furniſhed by their office, ſhall ever be perverted, directly or indirectly, to the purpoſes of ſpeculation. No private paſſion muſt mingle with the executive, any more than with the judicial part of public juſtice. This is eſpecially to be expected from ſheriffs, no longer left, from any apprehenſion of their future election, under the temptation of tampering with their duty. Being ſecure, by one appointment, for all the time which they are permitted to ſerve; the freedom of election, and independence of the officer, are happily provided for.

Conſtables are appointed by this court, and, by ſuch appointment, they become the proper officers for the execution of proceſs iſſued by juſtices of the peace, in actions of debt and demand not exceeding ten pounds. That great abuſes have been committed in their execution of this proceſs, by collufion with defendants, or

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with plaintiffs, and delaying the recovery of money, or recovering it in an oppreſſive manner, and by corruptly retaining it in their own hands, after it has been recovered, is generally known, and greatly complained of. It is alſo known, that juſtices of the peace, from a ſuſpicion of their want of power, or from other cauſes, have neglected or declined to take effectual meaſures for correcting theſe abuſes. But, if they ſhould not, and complaint ſhould be made againſt a conſtable to this court; ſhall we alſo be ſilent? I truſt not: and I have no doubt, that we, alſo, have full authority, to redreſs this enormous and growing evil. Without the appointment of this court, conſtables could not be ſuch, and ſo could have no power to execute proceſs of a juſtice of the peace. Having the power of appointment, it is our duty to furniſh juſtices of the peace with conſtables that will execute their proceſs faithfully and ſkilfully. They being officers of this court, we are, in ſome meaſure, reſponſible for all their official conduct; and bound to examine and correct it. Theſe circumſtances eſtabliſh a connection between this court and conſtables, acting as officers of juſtices of the peace, even in civil proceſs; and render it our duty to correct their faults, in this part of their duty, as well as in every other part of it.*

Of thoſe who may be ſummoned as jurors, either on the pannel of the grand, or the traverſe jury, a conſtant and regular attendance, and a proper diſcharge of the duties required of them, will be expected. If, in theſe reſpects, they ſhould be deficient, it will behove the courts to interpoſe that authority, with which the law has intruſted them.

This ſervice may be conſidered as a privilege and a duty. It is a privilege, being a portion of the judicial authority of the ſtate, reſerved to be exerciſed by the people, of whom a jury may be termed an abſtract or committee. It is a privilege alſo, as affording an opportunity of acquiring ſome acquaintance with the laws of our country; a competent knowledge of which, every citizen, eſpecially in a democratic republic, ought to poſſeſs. The exerciſe of this privilege, like every

* *See the caſe of an attorney of C. B.* 2, *Wils.* 382, *of B. R.* 3, *T. Rep.* 275, 1 *Str.* 621.

general privilege of a citizen, is a duty, which every citizen, qualified for the exercise of it, owes to the public; and which requires a sacrifice of both time and attention. It is a duty also, which he owes to the individuals, whose causes may come before him: for they have a right to a trial by that jury, which the laws have prescribed; and the absence of any one juror is an abridgment of that right, and a violation of that trial, the purity of which is essential to our liberty. Whether it be considered as a duty or a privilege, both the burden and the benefit ought to be equally distributed. The state has a right to require of every citizen, that he attain all the knowledge, which his situation will permit him to attain, and that he contribute a due proportion of his service. And every citizen has a right to require of the state, that no more than a just proportion of public service be laid upon him. And the law having provided for these ends,* every citizen qualified must be called out in his turn; and, when called out, will, we expect, obey his summons with strict punctuality, and perform his service with impartial accuracy. *Sept. Sess. 1791.*

If all concerned in the administration of justice shall thus be induced and constrained to unite in an upright, intelligent, and steady discharge of their respective duties; we may expect from the present construction of courts of justice, and distribution of judicial authority, essential service and profit to the state.

That you, gentlemen, who are selected as the first grand jury, for this county, under this new arrangement, will, in your place, contribute to this important purpose, by bringing every offender to light, I have no doubt. And that you will do this, with impartiality, influenced neither by fear, favour, nor affection, your good sense and regard to justice will direct, and the duty and independence of your station will require.

* 2 *St. L.* 266.

No. II.

December Seſſions, 1791.

Principles and Forms of Public Proſecutions.

MAN, in his ſolitary ſtate, is a kind of rational animal, but little diſtinguiſhed from the beaſts of the foreſt. It is in ſociety that he acquires that knowledge, refinement, and virtue, in which the dignity of his nature conſiſts, and by which he is exalted above the earth, aſſimilated to the divine nature, and prepared for thoſe regions, for which his maker deſigned him.

Unfortunately, it is not knowledge and virtue only, which he learns in ſociety: his wiſdom degenerates to craft, his refinement to diſſimulation, and his virtue to ſelfiſhneſs. Prone to evil, and prompted by paſſion, a ſenſe of duty, or a fear of future and inviſible puniſhment, cannot reſtrain him from miſchief: he muſt be bound by force, and feel inſtant revenge.

But aſſociations or ſtates being formed chiefly to preſerve themſelves from external violence; in the infancy of ſtates, and in the rude ſtages of ſociety, offences, committed by one member of the community againſt another, were probably left, for redreſs or recompence, to the ſtrength or cunning of the perſon offended, and thoſe whom he could aſſociate in his cauſe. If the offended perſon and his friends were ſilent, the public was not conſidered as having any cauſe of complaint; or if they ſought revenge, it was permitted, as a thing of courſe, proſecuted in their own manner, and abandoned at their will.

By degrees, this would appear improper and dangerous. An angry injured man will ſeldom ſtop at the juſt meaſure of revenge; and calamity would be perpetuated by the very means taken to puniſh or prevent it. Only one half of the benefits of ſociety would appear to have been obtained, if it guarded but againſt the external ruffian, while it foſtered one, not leſs dangerous, in its boſom. The offender might elude the ſearch, or overcome the force of the private avenger; and a neceſſity would ariſe, of ſtretching out the public arm, in aid of juſtice.

But, leſt public vengeance ſhould too haſtily interfere, certain ſolemnities muſt be adopted, to mark out the victim, on which it ſhould fall. Courts of juſtice were inſtituted; where, and where only, the injured man was to ſeek redreſs. Laws were framed, to deſignate the actions, which the public would reſent; and regulate the puniſhment, which the offender ſhould receive. In doing this, the diſtinction between crimes and injuries would be at firſt obſcure; when attempted to be aſcertained, would be long variable; and the ſame action would, at one time, be ranked as a crime, at another, as only an injury.

Even when the ſtate had thus determined, that vengeance belonged to itſelf, and was to be repaid by it alone; ſtill its power was exerted only to recompenſe the damage, or gratify the revenge of the perſon injured: and the criminal was permitted to purchaſe the friendſhip, or ſoothe the malice, of his antagoniſt, on certain terms, or as he beſt could.

But, as ſoon as an idea ſo refined could exiſt and prevail, that the whole community made, as it were, one perſon; all the qualities and paſſi ns of a perſon would naturally be aſcribed to it. It would have its fear, to prevent danger; its honour, to feel indignity; its revenge, to inflict puniſhment. And, it being the duty of the whole, to preſerve every member from harm, an injury to any individual would be reſented and puniſhed, as an injury to the perſon of the ſtate.

The ſyſtem now became totally inverted: beginning with private compenſation, without any idea of public puniſhment; it ended in public puniſhment, without leaving any room for private compenſation.

Perhaps receding back to a mean between thoſe extremes, in ſome caſes, where compenſation was poſſible, and the damage ſuſceptible of eſtimate*, the laws fixed on a rational rule; and, without relinquiſhing public puniſhment, decreed redreſs to the individual injured. Yet even here, the leading idea was the offence againſt the ſtate. And it is a characteriſtic of a crime, that it is the ſtate, which is offended; the ſtate, which proſecutes for revenge; and the ſtate, whoſe honour is to be

* *Robbery, larceny, &c.*

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repaired. Though, in ſome countries, as in Scotland, the individual chiefly injured is ſuffered to join, with the ſtate, in the proſecution; and, in ſome crimes, as in murder, is ſuffered to proſecute criminally alone, by appeal.

One refinement more was neceſſary, to complete the ſyſtem. When private revenge was prohibited, by law, to interfere, it might ſtill work under colour of law, and the name of the ſtate be aſſumed, not for public good, but for private malice. To prevent this, various means have been adopted. Sometimes an oath, called the oath of calumny, has been impoſed on the proſecutor, by which he ſwears, that he proſecutes, for the ſake of juſtice. To this has ſometimes been added, that, if the party accuſed be acquitted, his accuſer ſhall ſuffer the ſame puniſhment, which would have been inflicted on the accuſed, if he had been convicted.

Another check on malice has been the appointment of a public accuſer; an officer, whoſe duty it was, and who alone had authority, to inſtitute and manage proſecutions for offences againſt the ſtate.

But the nobleſt check of malice, and the moſt effectual of all, is a grand jury; whoſe duty it is, to take cognizance of all offences; and without whoſe ſanction, no criminal can be brought to juſtice; an inſtitution, which is well calculated to preſerve the innocent individual from oppreſſion, either from the power of the ſtate, or the malice of a fellow citizen.

You, gentlemen, who are now called to a duty ſo important, a ſervice ſo honourable, and an office ſo eſſential to the liberty of your country; may ſee the object of your preſent attention. You are now called forth, to preſerve your fellow citizens from all accuſations malicious and unjuſt, and preſerve the laws of your country from all violation. Wherever there is a falſe charge, cover it with your diſapprobation.—Wherever there is a true one, bring it to light. The more eſſential to liberty the inſtitution of a grand jury is, the more zealous ought you to be, to preſerve its functions. For the ſure way to deſtroy, is to pervert it. If you will not give legal ſcope to the reſentment of injury, you deſtroy the ends of civil ſociety, and bring us back to the ſtate of nature. If you interpoſe the weight of

public authority, on every light or falſe grounds, you bring the inſtitution into contempt and averſion; and, by puniſhing one innocent perſon, lay a temptation for the acquittal of many guilty. *Dec. Seſſ.* 1791.

You are not now to learn, that offences, the peculiar ſubjects of your enquiry, are ſuppoſed to be committed againſt the ſtate; which, on the principles of civil union, is bound to protect all its members from injury.

When the offence, or unlawful act, is of a general nature, ſo as to manifeſt a forcible oppoſition to government itſelf, and not an individual citizen; as to pull down *all* incloſures, deſtroy *all* brothels, reſiſt *all* proceſs, and abuſe *all* officers; what is this but treaſon, levying war againſt the ſtate; an uſurpation by individuals of the ſovereign power of redreſſing grievances, making or annulling laws?

When the unlawful act is only of a particular nature, directed againſt an individual, without any deſign to oppoſe government, it is a riot, not treaſon.

Yet a riot is an heinous offence, and all tumultuous proceedings by perſons fewer in number, than are neceſſary to conſtitute a riot, are groſs miſdemeanors, productive of increaſing miſchief, diſgraceful to ſociety, and pernicious to liberty. If one man, or one corner of a country, be at liberty to redreſs a grievance by violence; every man, and every corner of the country, muſt have the ſame liberty; and every man be free to judge, what is a grievance, and how it is to be redreſſed. One part of the people will take up arms, for one cauſe; another, for another. Others will arm, to defend the very things, which the firſt attack. No man's life or property is ſafe, if any man may decide, whether he ſhall poſſeſs them or not. And inſtead of free citizens, we ſhall become bands of ſavages, and mobs of ruffians.

To quell theſe ſcenes of riot, even wiſe moderate and good men will think it neceſſary to ſtrengthen the hands of government with new powers, which will naturally increaſe, till the ſilken cord of liberty be converted to a yoke of iron.

This is the natural iſſue of tumults, where liberty is uſed as a cloak of maliciouſneſs. There can be no liberty, but where the laws govern every man. The

Dec. Seff. 1791. moment that the laws are defeated, the government is deſtroyed. And the man who forcibly reſiſts the laws, lays the foundation of the ruin, either of himſelf, or of the government. His oppoſition, and the exiſtence of the government are incompatible; and he brings the matter to this plain point, whether the government or he ſhall fall. In the deciſion of this iſſue, he muſt expect to have all the wiſe and good againſt him; for none ſuch will deſire to preſerve their lives, longer than the time comes, when they muſt owe their preſervation to any thing elſe, than the laws of their country.

The application of theſe ſentiments is obvious to you all. They are drawn from me by the regret, with which I have heard of ſome late riotous proceedings in this county,* and the mode of expreſſing reſentment by tar and feathers; which however natural in the convulſions of a revolution, is altogether inconſiſtent with a ſettled government. They are delivered to you, with a perfect conviction of their truth, a ſincere regard for the welfare of this country, and a wiſh, that they be conſidered as not ſo much the denunciations of a judge, as the faithful counſels of a friend.

* *In Waſhington county firſt, and afterwards in Allegheny, Weſtmoreland, and Fayette, there were riots againſt perſons engaged, or ſuppoſed to be engaged, in the collection of the exciſe.*

No. III.

Principles, Nature, and Ends of Public Puniſhments.

March Seff. 1792. HUMAN conduct is under the influence of two very ſtrong paſſions, hope and fear. Without objects to affect theſe, man would be a liſtleſs being, and life would hardly deſerve its name. Religion would be defrauded of its moſt powerful motives, and government diſarmed of all its control. This is the myſtery of faith, and the means of obedience. By theſe the human will is to be bent, and man's actions governed.

Some have disputed whether human laws reward merit; but all agree, that they punish crimes. They do this by their command over those things which are the objects of fear, as poverty, disgrace, bodily pain, or death. *March Sess.* 1792.

That justice should be satisfied, by inflicting the same quantity of pain upon the guilty person, which his crime has occasioned to the person injured by him, is rather a fictitious, than a just sentiment. It has perhaps given birth to the law of retaliation, which demands eye for eye, tooth for tooth, and life for life.* But however natural or proper, as a regulation of justice, it does not explain the final cause of punishments. Even on the ground of retribution, it may often be exceptionable, as ministering neither the same sorrow to the offender, nor any compensation to the person injured.

The rational end of punishments is the prevention of crimes. This is evidently the end of laws; and punishments are only means of making laws effectual. The prevention of crimes may be aimed at in two ways; by the effect which the punishments are intended to have on the minds of others, and by their effect on the criminal himself.

Some punishments are intended to operate only on the minds of others, by way of example. Such are all capital punishments, which leaving no space, either for repentance or new guilt, deprive the offender, at once, of the power of doing either good or evil.

Exile, banishment, or transportation has an imperfect, and but an imperfect influence this way, or either way, while it seems to embrace both. Its object cannot fairly be the reformation of the criminal; since it cuts him off from the society, as a member altogether useless or dangerous. Nor can it fairly be an example to others; since it removes him from the view of those, who have been witnesses of his crime, and are to be warned by his punishment. Yet that separation from friends, family, and home, which is effected in their presence, seems to have a strong tendency, as an example; and the opportunity, which it gives of rising to a

* *Exod. xxi.* 23.

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new character, in a ſtrange country, ſeems to be a ſtrong excitement to reformation.

Pain is to all men, in all circumſtances, an object of terror, and therefore a ſure mean of puniſhment. For offences of great turpitude, which indicate a baſeneſs of mind inſenſible of ſhame; for offences of evil or dangerous tendency, eſpecially where the temptation is love of pleaſure; bodily pain is, both for example and reformation, a proper puniſhment. It operates by example, from its ſeverity, its duration, and viſible marks. It operates by reformation, from all theſe circumſtances, counter balancing the temptations to guilt.

To ſome minds, diſgrace is more intolerable than pain. To ſuch, therefore, diſgrace may be a proper puniſhment; and to others, of ſimilar feelings, an example. But the law ought to take care, that it have this puniſhment at command. To condemn to the pillory a man convicted of a popular offence, is to reward him with the joys of martyrdom, or the honours of a triumph. And to puniſh a baſe mind with diſgrace, is to torture a dead body.

For frauds, extortion, uſury, and other offences, to which men are prompted by an inordinate love of money, pecuniary loſs, by way of mulct or fine is a puniſhment of peculiar propriety. As ſuch offences are ſymptoms of a ſordid avarice, to which money is the greateſt joy, and the loſs of it the greateſt evil, the offender is puniſhed in his tendereſt part; and his puniſhment can, at the ſame time operate, not only as a check to himſelf, and an example to others, but alſo as a compenſation to the perſon injured by his offence.

Syſtems of puniſhment have been formed on two different principles. According to one, capital puniſhments have been annexed to few crimes, but certainly inflicted. Some have doubted whether life ought ever to be taken away for offences againſt property. This doubt muſt have ariſen from the imperfection of puniſhments, merely as a ſatisfaction of juſtice. Even in this view, it will be acknowledged, that puniſhments ought to be in proportion to crimes; and that the degree of guilt, and therefore of puniſhment of any crime, is to be meaſured, not merely from its immediate nature, but from that, and its uſual effects. Such an adjuſtment

we ſhould expect, from perfect juſtice, and perfect knowledge, that no crime ſhould eſcape, leſt crimes ſhould multiply by indulgence; and that the danger of committing them ſhould be increaſed, according to their miſchief. But though divine perfection, in the meaſure of its retributions, regards only the degree of guilt, man's knowledge is limited, and his retributions imperfect. In our eſtimate of puniſhments, conſidering them not only as ſatisfactions of juſtice, but as means of preventing crimes; we muſt compute not only the degree of guilt, but the facility of its commiſſion. Many crimes eſcape notice; and human frailty muſt compenſate its want of penetration into ſecret guilt, by the ſeverity of its puniſhment, when detected; that the degree of puniſhment may counterbalance the chance of eſcape. Hence it becomes neceſſary, that the degree of puniſhment be in proportion, not to the greatneſs of the crime only, but to that, and the facility of its commiſſion. And diſtinctions in puniſhment, between principals in the firſt, and in the ſecond degree, exciting different degrees of terror, might raiſe a difficulty in the contrivers or aiders of crimes, to find agents or inſtruments. *March Seſſ.* 1792.

The true rule, then, is, that puniſhment ought to be ſo ſevere, as to be examplary, and ſufficiently to counterbalance the temptation to crimes; that, if poſſible, it ſhould be of ſuch a nature, as to be ſome compenſation to the community, and the party injured, by the crime; and that it ſhould tend to the reformation of the criminal, and never cut him off from the ſociety, till he appear uſeleſs and dangerous to it. Exile and death, depriving the ſociety of all further ſervice from the ſuffering member, ought to be the laſt remedies for guilt, and never be adminiſtered, while there is any reaſonable proſpect, that the offender may be made either uſeful or harmleſs to the community. A limb is not to be lopt off, for every ſore; and he is an unſkilful ſurgeon, who uſes no other remedy but amputation.

By a ſyſtem founded on another principle, capital puniſhments have been denounced againſt many crimes, with an expectation, that the power of pardoning will be extended to many inſtances of each. There are few crimes of the ſame name, which do not admit of many

March Seff. 1792. degrees of guilt. Like that gradation, which pervades nature, the loweſt degree of one crime nearly touches the higheſt of an inferior order, as the higheſt does the loweſt of a ſuperior. To inflict the ſame puniſhment on every degree of each crime, would be unequal; to aſcertain and deſcribe the different degrees, and fix a puniſhment proper for each, would be difficult or impoſſible. The ſame puniſhment is, therefore, denounced againſt all degrees of the ſame crime; but as this, from the different circumſtances attending them, will eſtabliſh unjuſt retributions; a power of pardoning is interpoſed, at the diſcretion of the chief magiſtrate. He, who, of all the community is preſumed the moſt remote from private influence, ſits again in judgment on the criminal, and decides, whether that degree of his crime, of which he hath been convicted, be pardonable or not. In this manner the fear of death, of all fears the greateſt that man can inſpire, is made to operate againſt the greateſt number of crimes, with the leaſt injuſtice; and yet that indulgence, neceſſary to render the puniſhment more equal, is no encouragement to crimes; for the chance of eſcape, by pardon, is too precarious a defence againſt this fear.

One may indulge a compariſon between this proviſion, for the pardon of criminals of certain degrees in every offence, and that of cities of refuge for manſlayers among the Jews. Among that people, all homicides were puniſhable with death; but under theſe regulations. Where the homicide was undeſigned or caſual, the ſlayer might flee to a city of refuge, and there remain in ſafety, till the death of the high prieſt, when he might return home under the protection of the law.* But if, before he reached a city of refuge, the avenger of blood overtook him; or afterwards, and before the death of the high prieſt, found him without the city; and killed him; the avenger was not guilty of blood.† But to a man, who purpoſely, and from hatred, killed another, the cities of refuge, or even the altar of God, afforded no protection. For him, no ranſom was to be admitted; he was to be taken from the altar, or, if he had fled to

* *Num.* xxxv. 11, 28. *Deut.* xix 24. *Joſh.* xx. 3, 6.
† *Deut*, xix. 6. *Num.* xxxv. 26, 28.

a city of refuge, the elders of his city were to ſend and fetch him thence, and deliver him into the hands of the avenger of blood, that he might die.* *March Seſſ.* 1792.

The ſyſtem of puniſhments, like every other part of the adminiſtration of juſtice, and every part of civil polity, receives its improvement by degrees and length of time. It was not till ſociety had made conſiderable progreſs, and long after they had become a public duty, that judicial inſtitutions were a public burden. The ſovereign, who, to his wealth, owes his authority, muſt out of that wealth, adminiſter it. But his adminiſtration is not therefore free. The man who comes to claim his interpoſition, and obtain juſtice, muſt not expect to rouſe the deſpot from his couch, without a preſent in his hand. According to the value of the preſent, are the exertions of the prince, to procure redreſs. And the unhappy wretch, whoſe offence has diſturbed the ſloth, or interrupted the pleaſures of his lord, muſt compenſate, not only the damage of his neighbour, but the moleſtation of his judge. He muſt gratify his avarice by money, or his revenge by ſuffering. The leſs any country is removed from this ſtate, the ſeverer are its puniſhments; and, in this ſtate, the ſevereſt of all.

But when the private revenues of the ſovereign, by gradual dilapidations, are no longer adequate to the exerciſe of his authority; and his power, parcelled out in different branches, is delegated to miniſters, for whoſe maintenance taxes are eſtabliſhed; the adminiſtration of juſtice, of which the prince is perſonally relieved, becomes a ſeparate employment, the labour of which is compenſated out of the general ſtock, and not from the fortune, nor by the ſufferings of the criminal. The trouble of adminiſtering juſtice forms no immediate part of the eſtimate of the puniſhment due to the offender. One temptation to its ſeverity is withdrawn. And puniſhments become more gentle, when they are inflicted, not by paſſion, but by reaſon; and eſtimated by the damage of the individual injured, and the diſturbance of the ſociety; not by the anger of the judge.

The progreſs of knowledge, and the admiſſion of the

* *Num.* xxxv. 31, 32. *Exod.* xxi. 12, 14. *Deut.* xix. 11, 12.

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people into a ſhare of the burden, and therefore of the power of government, which contribute to the moderation of puniſhments, contributing alſo to the increaſe of liberty; it may be laid down, that in the freeſt governments, the puniſhments will be the moſt moderate. In deſpotic countries, the laws are the will of the tyrant, who is under no inducement, from a ſenſe of his own ſubjection to his laws, to make them lenient. In free countries, the laws are the will of the people, to whom a ſenſe of ſubjection is a conſtant motive to lenity. It may require alſo ſanctions leſs ſevere, to ſecure the obedience of the people to their own will, than to the will of their tyrant. May we not therefore wonder, that the country in Europe, which firſt exhibited the example of abolition of capital puniſhments, is the moſt ſavage, and moſt enſlaved. But let it be remembered, that while Elizabeth, the late empreſs of Ruſſia, prohibited all puniſhments by death,* ſhe had the deſarts of Siberia, whither to baniſh the victims of her juſtice: and religions which inculcate the belief of a purgatory, need leſs retain the terrors of Hell for ſanctions of morality.

In England, beſides the prerogative of pardon, what is called the benefit of clergy, or relieving a criminal from capital puniſhment, if he could read, being extended to, or withdrawn from, different degrees of guilt, regulated the unequal denunciation of death to a great variety of crimes very different in their natures. The ſtatutes which introduced into their law tranſportation, as a puniſhment for thoſe, whom it was neither thought proper to kill, nor to retain longer in that diviſion of the empire, greatly ſoftened the rigour of puniſhments. After the troubles, which ſeparated this country from Britain, had rendered the uſual mode of tranſportation difficult, an act of parliament ſubſtituted, in its ſtead, confinement to hard labour on the river Thames.—— Still, however, notwithſtanding the boaſted liberty and knowledge of that kingdom, their puniſhments too much ſavoured of the rude barbarity of thoſe ages, in which the ſource of all laws and government is obſcured. At

* *The puniſhment of the Knout remained, and is frequently fatal in its conſequences.*

laſt, Mr. Howard, deſervedly ſtiled the "Philanthropic Howard," who, of all men, ſeems alone to merit that addreſs of the author of our religion, "I was in priſon, and "you came in to me;" who travelled through the world, to viſit not the riches of cities, nor the grandeur of courts, but the miſeries of gaols; unveiled the ſorrows of thoſe doleful abodes of miſfortune and guilt, and the ſalutary purpoſes to which they might be improved; excited reflection, and inſpired the idea of mixing mercy with puniſhment, and introducing humanity and hope into the dungeons of guilt and deſpair. The puniſhment of criminals became a ſubject of philoſophical inveſtigation. Acts of parliament were made, and ſocieties were formed, to alleviate the miſeries of priſons, to cleanſe them from filth and diſeaſe, and convert even thoſe hopeleſs manſions into ſcenes of induſtry and uſeful labour.* *March Seſſ.* 1792.

To ſo important an improvement in criminal juriſprudence, the free and intelligent commonwealth of Pennſylvania could not long be indifferent. Eagerly embracing a ſcheme, founded on the truly parental and benevolent principle, that the reformation of the criminal, reſtoring him to a new mind, a new ſtate, and a new character, is the true end of puniſhment; ſhe carried it to a degree of practice and improvement unknown to other nations; and which an equal diſtribution of property, certain ſucceſs of honeſt induſtry, infrequency and moderation in crimes, freedom of government, importance of the people, and mildneſs of their manners, rendered her peculiarly qualified to exhibit.

An act paſſed in 1786, to reform the penal laws of this ſtate,† reduced the crimes puniſhable by death to a ſmall number, and, for other crimes, decreed a temporary ſervitude; that the criminal, in a ſtate of ſubjection and labour, might form reſolutions of repentance,

* *Labour at the gallies, mines, &c. had long been uſed, as a puniſhment, not as a mean of reformation. But, ſince writing the above, I have ſeen in the life of Mr. Howard, that confinement for reformation, had before his introduction of it into England, been uſed on the continent, in Germany, Switzerland, and eſpecially in Holland; and that his ſyſtem was the reſult of his obſervations in thoſe places.*

† *15th of September.*

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It is a thing much to be deſired, that the experiment could be as well tried, in every part of the ſtate. Were every county provided with a gaol ſo ſecure, and ſo large, that criminals could be confined to labour in ſeparate cells within it; it might perhaps be poſſible to render their impriſonment not expenſive, and their labour advantageous to the community. But, above all, the great end of puniſhment, the reformation of criminals, might be accompliſhed: the dreary ſolitude and ſilence of their ſtate, while painful to themſelves, and examplary to others, from the diſmal apprehenſions, which it would naturally inſpire, would furniſh them with proper reflections on the danger of folly and guilt; and preſerve them from that mutual corruption, which the ſociety of each other might produce. Every priſon would become a workſhop. Their labour might accuſtom them to honeſt induſtry, and the priſoners might come forth, from their confinement, uſeful members of ſociety.

In England, where labour is cheaper, and proviſions dearer, than in this country; the penitentiary-houſes, or priſons eſtabliſhed on the new ſyſtem, inſtead of an expence, have been a ſaving to the county. In a ſtatement made by Mr. Howard, of the expence and

* *27th of March.* † *5th of April.*

earnings of the county gaol in Oxfordſhire, for the years 1786 and 1787, it appears, that, in the year 1786, the whole earnings of the priſoners amounted to one hundred and ninety-eight pounds, one ſhilling, and eleven pence, ſterling, and the whole expence, in clothes, proviſions, attendance, and materials, to one hundred and ſeventy-eight pounds, one ſhilling, and nine pence, halfpenny; ſo that there was a ſaving of twenty pounds, ſterling. And, in the year 1787, the ſaving amounted to one hundred and thirteen pounds, nine ſhillings, and two pence, ſterling. All this was effected, when, at the ſame time, the managers were enabled, from the ſhare of earnings allowed to the priſoners, to diſcharge them completely clothed, with ſome money in their pockets, a good character given them, with a promiſe, that if, at the end of the year, they bring a certificate, from the maſter, with whom they ſhall have worked, of a good and ſober character, they ſhall be further rewarded.* *March Seſſ.* 1792.

Effects like theſe, produced by human laws, bringing good out of evil, ſo reſemble divine benevolence, and creative power, that they may be juſtly ſtiled the ſecondary operations of the Deity.

I turn now to a ſubject of more melancholy reflection, the enumeration of a few of the offences againſt the laws of the ſtate, the catalogue of which, the perverſe ingenuity of the human mind hath ſo deplorably extended.

* *Extracts and remarks on the puniſhment of criminals publiſhed by order of the Philadelphia ſociety for alleviating the miſeries of public priſons. p.* 19.

No. IV.

Principles of Laws and Crimes.

June Seſſ. 1792.

CIVIL government has two objects, the protection of itſelf, and the protection of the individuals ſubject to its authority. The government itſelf, may be injured, by alterations in its principles or its form. Individuals may be injured in their perſons, fame, or property. Mutual intereſts, as we view them, are not ſo equally balanced, or ſo conſiſtent, nor are the impulſes of benevolence, the dictates of moral duty, or the paſſion of public ſpirit, ſo ſtrong, as to ſecure theſe objects without laws and penalties.

The ſafety of the ſtate or individuals may be affected by foreigners, or by citizens. Private foreigners, while within the bounds of the ſtate, enjoying a temporary protection, owe alſo a temporary allegiance, are ſubject to its laws, and puniſhable, as citizens. Every ſtate ought to do juſtice on its citizens, for injuries done to another ſtate, or citizens of another ſtate. A refuſal of juſtice by a ſtate on its citizens, for an injury to citizens of another ſtate, ought to be conſidered as an injury to the ſtate whoſe citizens are injured. For injuries committed by one independent ſtate to another, there is a code of laws eſtabliſhed, by common conſent, the law of nations; and the penalty of its infraction is war or repriſals. But it is with a view to its own citizens, chiefly, that the laws of a ſtate are made; to reſtrain them by penalties, within thoſe bounds, which their intereſts and paſſions are ever tempting them to tranſgreſs

Crimes, then, are tranſgreſſions of thoſe laws, which a ſtate has eſtabliſhed, for the protection of itſelf, and its citizens. The power of making thoſe laws, is derived from the principles of the government. Certain portions of natural power are ſurrendered into the hands of certain men, to be uſed or controuled for the benefit of the whole. Every law is an encroachment on natural liberty. The more laws are multiplied, the more liberty is reſtrained; the power of government becomes greater and that of individual citizens leſs. In the formation

of a ſtate, no more power ought to be veſted in the government, than is neceſſary for its free and effectual operation. And, in the operation of the government, no more laws ought to be made, than the protection of itſelf and its citizens requires: for, as where there is no law, there is no tranſgreſſion, the multiplication of laws will multiply crimes. *June Seſſ.* 1792.

But though, as laws increaſe, liberty is diminiſhed, it may not be leſs, than it ought to be. Liberty is then only leſs than it ought to be, if more power be given to the government, or more laws be made by it, than its own proſperity, and that of its citizens require.

It is, therefore, not ſo much from the number of laws, as from the nature of them, that liberty is in danger. It is of the utmoſt conſequence, in the formation of laws, to follow the nature of things; and, if poſſible, to forbid only thoſe actions, which in themſelves, or their obvious conſequences, are injurious to the rights of nature, or the modifications of the ſociety and government. Actions injurious to the rights of nature, and the principles of the government, ought, every where, to be forbidden. But the modifications of different governments and ſocieties, the ſituation of different countries, the product of their ſoil, the nature of their manufactures and trade, may occaſion the prohibition of ſome things, naturally lawful; and forbid, in one country, that which is allowed in another.

The diſtinction of a *moral* and a *poſitive* law, of a thing evil in itſelf, or only evil becauſe it is forbidden, is very common, but where laws are framed on the principles which have been ſtated, may be juſtly queſtioned. Nothing ought to be forbidden, which, either immediately, or in its conſequences, is not injurious either to the ſtate or individuals. And every thing, which, either immediately, or in its conſequences, is injurious to the ſtate or individuals, muſt be evil in itſelf. The opinion alſo ſeems queſtionable, that it is a matter altogether indifferent in conſcience, whether a law merely poſitive and penal, be implicitly obeyed, or its penalty ſubmitted to. The diſcharge of the duty of a citizen is ſurely a matter of conſcience; and this duty cannot be diſcharged, if actions, prohibited by law, be wilfully committed. Due reſpect for the laws can leſs eaſily be preſerved, if

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any of them may be contravened, without the idea of criminality. The alternative of obedience or ſuffering may be extended to all laws whatſoever. The principle ſeems dangerous, to ſubmit to the conſideration of every citizen, whether the law be proper or not; and whether it be indifferent to the ſtate, to receive from its citizens either obedience or penalties. And the idea of tranſgreſſing one law, without guilt, may, in time, render familiar the tranſgreſſion of all.

If laws are unneceſſarily multiplied; and actions are forbidden, though neither contrary to the rights of nature, nor to the obvious principles of the government, or modifications of the ſociety; the citizen feels nothing in his own breaſt ſuggeſting criminality in the action, and has nothing to reſtrain him, but the poſitive law, which may be little known, and be tranſgreſſed without a ſtruggle. Thus when laws have not their ſource in the nature of things, the citizens tread continually on traps, or pitfalls; and ſlip, unawares, into tranſgreſſions, crimes, and puniſhments. Crimes, if it were poſſible, ought to be known, as it were by intuition, and carry on them a diſtinguiſhing mark of abhorrence.

All things wrong in themſelves, or of bad conſequence are not forbidden by law. Some are left to be reſtrained by reſpect for public opinion, or awe of religion. Nor is it of every law, or rule of conduct, that the tranſgreſſion is deemed a crime. Some tranſgreſſions have no penalty annexed to them, nor have they any other conſequence, but a compenſation for the loſs of the injured party. The law ſeeming only to puniſh thoſe infractions of that neceſſary and general confidence, which every citizen muſt place in every other, remits to a civil remedy thoſe breaches of truſt, which reſult from mutual contract. As their own care may prevent theſe, the law will not puniſh them. Analogous to this is the rule, in civil caſes, that a man, acting by permiſſion of the law, becomes, if he abuſe this permiſſion, a treſpaſſer from the beginning; but not ſo, if he acted by the permiſſion of the party, for then he is anſwerable only for the abuſe of the authority.

The guilt of crimes is to be eſtimated, not from their own nature only, but alſo from their conſequences.

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An individual action, in itſelf, of ſmall account, may become too formidable to be overlooked, leſt the ſame indulgence ſhould be claimed for all others of the ſame kind. And the true queſtion is, what would be the conſequence, if *all* actions of this kind were indulged, and ſhould become common.

A forgery of money or bills may have no other immediate conſequence, but a trifling loſs, perhaps, to a very rich man; and a trifling gain, perhaps, to a very poor man: it may, in fact, be a charitable application of a ſum otherwiſe uſeleſs. But even ſuch forgery muſt be puniſhed; for the law muſt be general; and a general indulgence of forgery would produce mutual diſtruſt, the loſs of trade, the ruin of agriculture, a failure of the means of ſubſiſtence, and, of courſe, a decay of the human race.

Crimes, which tend to the diſſolution of the government, are, of all others, the moſt heinous. The government being an abſtract exiſtence, its diſſolution may not ſo much ſhock the feelings of the human heart, as the deſtruction of one man, the object of our ſenſes.—But when we reflect, that government is neceſſary for the happineſs of mankind; that this crime tends to unhinge every ſociety (for ſociety cannot ſubſiſt without government) and reduce men to the ſtate of ſolitary and ſavage animals; the loſs of an individual life will appear ſmall, in compariſon to that deſolation of the face of nature, of the works of art, and of the human mind, which want of government would produce. The leſs evils would alſo be included in this greateſt of all. For a government is ſeldom overturned, without the death of many of its citizens. And, when treaſonable purpoſes are formed, and begun to be put in execution, a gate is opened, at which may ruſh in a torrent of evils, never in the contemplation of the authors of the calamity, and againſt which, they are not able to bear up.

Of crimes againſt citizens, thoſe are the moſt dangerous, which are committed with force. And the danger is in proportion to the extent of the force, and the importance of the object, againſt which it is directed. Governments are framed, to place the ſtrong and the weak on perfect equality; to remove that unreaſonable

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advantage, which, in a ſtate of nature, the one has over the other; and to preſerve to every man the innocent, equal, and free exerciſe of his own powers, and the fruits of his own induſtry, in peace. If government, therefore, cannot reſtrain force, its end is defeated; there is, in fact, ſo far, no government; and men muſt live in perpetual fear of each other, and apprehenſion of unknown dangers.

It may, to ſome, appear doubtful, whether actual force ought not to be reckoned an eſſential ingredient in a crime. Perhaps the Lacedemonians carried this principle the fartheſt, in their indulgence to theft. Yet ſome frauds, againſt which common prudence cannot ſave itſelf; and to defeat which, that confidence, neceſſary for mutual dealings, muſt be withdrawn; are, with propriety, ranked in the claſs of crimes.

There are many political reaſons, againſt obſtructing the current of public opinion. And the ſame circumſtances exiſt not, in the caſe of libels, as in the caſe of criminal frauds. Theſe may be practiced, in ſo ſecret a manner, that only the perſon injured may be privy to them. To leave ſuch frauds, therefore, to redreſs by civil action, might be to indulge them with impunity. Libels are of a public nature, and frequently known, almoſt by all, before they are known by the perſon whom they offend. But, notwithſtanding theſe reaſons, wanton or malicious injuries to the reputation of another, in the way of libel, conſidered as temptations too ſtrong for human frailty to reſiſt; provocations of wrath too powerful for reſpect of the laws to reſtrain; and inſults likely to be revenged with force, and the diſturbance of ſociety; are generally proſecuted and puniſhed as public offences. And libels againſt public officers or authority, ſeducing the citizens from their duty, are offences of a dangerous tendency.

DUTY

No. V.

Duty of a Grand Jury.

September Seſſions, 1792.

STATES uſually riſing from ſmall beginnings, it is not in their origin, that we are to look for many offices of diſtinction, and peculiar duty. The citizens, few in number, and within narrow bounds, can, without great inconvenience, aſſemble, and declare and execute their will. By degrees, theſe functions become leſs commodious for the whole body of the people, and they are devolved on ſelect individuals, free from the ordinary engagements of life, and devoted to public ſervice. Even for them, the adminiſtration of all the duties of government becomes burdenſome; and, both for convenience and ſafety, it ſoon becomes neceſſary, to divide authority into ſeveral branches, and allot a ſeparate ſet of men to each branch. Thus, while officers of one kind are employed in deliberating on the wants and improvements of the ſtate, and declaring its will by laws; other officers are carrying thoſe laws into execution.

In ſome ſtates, the progreſs is more rapid, than in others, and, in different ſtates, the people have retained different portions of power.

On theſe principles, would I account for the origin of juries. They are the remains of thoſe times, when the whole people of a diſtrict aſſembled, to adjuſt the controverſies, and aſcertain the guilt, ariſing within their limits. Their ſimple ſtate of living, and modification of property, required few laws. There was little perplexity or refinement in their diſputes; and as their penal code was very ſhort and rude, the degree of the demerit of their criminals was eaſily aſcertained. The knowledge of their laws was ſoon learnt. Not drawn from the ſpeculations of a ſyſtem, it aroſe almoſt from their feelings, and little was wanting, but a ſound underſtanding, and clear diſcernment, to conſtitute a judge.

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With men, diſputes multiplied; and with the progreſs of the arts, the perplexity and refinement of the laws increaſed. It would have required too much time of every citizen, if the whole diſtrict had liſtened to the examination of every cauſe. A certain number of them was deemed ſufficient; they attended on thoſe trials, at certain periods, and in rotation; and every man had his courſe of public duty; and private buſineſs or relaxation. The increaſed number, and more complex and refined nature, of the laws, required a length of time, to underſtand them, which all the citizens could not afford to beſtow. The knowledge of them became a particular ſcience; the acquirement of it a profeſſion by itſelf; and none were ſuppoſed qualified, to declare what the law was, but thoſe, whoſe profeſſion it was, to know it. Thus, we may conjecture aroſe a court, and a jury. The people, truſting to their officers, to declare the law, reſerved to themſelves the privilege of aſcertaining the facts, which, in each man's conduct, was to be meaſured by that law. A noble privilege! which cannot be too highly prized, or too purely preſerved.

Juries, therefore, being the repreſentatives of the whole people of a county, ſitting in judgment on the lives, liberties, fame, and fortunes of their fellow-citizens; ought, in this high capacity, to feel themſelves exalted above every little prejudice, or private intereſt: with no other motive, but public juſtice, no other rule, but the laws, they ought to diſcharge their duty, with that accuracy and care, which an office, on which depends the liberty of their country, can demand, from men of conſcience in a public ſtation.

Juries are of two kinds, grand juries, and petit or traverſe juries. Grand juries have, in ſome reſpects a more general, and, in ſome reſpects a more limited province, than traverſe juries. Grand juries enquire only into crimes; but they enquire into all crimes; and, except in the caſe of miſdemeanor in office, which may be proſecuted by information,* no criminal charge can be brought into a court of juſtice, in this ſtate, unleſs it have acquired the ſanction of a grand jury. A traverſe jury ſits on a particular cauſe, in which the parties have

* *Conſt. ix.* 10.

reduced the diſpute, by their previous pleadings, to one, or a few points. But this cauſe may be either criminal or civil, and no diſputed fact, of either kind, can be determined, without the intervention of a traverſe jury. *Sept. Seſſ.* 1792.

Though the precept, for ſummoning a grand jury, enjoins the ſheriff to ſummon twenty-four, yet no more than twenty-three can be ſworn and be of the jury. For, as the agreement of any twelve of the jury, either to find or reject a bill, is concluſive; if two full juries were ſworn, a compleat jury of twelve might find a bill to be true, though other twelve of the ſame jury might reject it as untrue.* There ought to be, at leaſt, thirteen on a grand jury,† and it is ſeldom thought expedient to ſwear ſo few. They muſt be good and lawful men of the county.

When the grand jury is called and aſſembled, they are ſworn *diligently to enquire, and true preſentment make, as well of all ſuch matters, as ſhall be given them in charge, as of thoſe things, which they may know, of their own knowledge; the commonwealth's counſel, their fellows, and their own, to keep ſecret; to preſent no man, for hatred, envy, or malice; and to leave no man unpreſented for love, fear, favour, reward, or any hope thereof; but to preſent all things truly, as they come to their knowledge, according to their underſtanding.*

This oath ſeems well contrived, to expreſs, briefly and fully, the duty of a grand jury. It conſtitutes a good directory, for the diſcharge of this honourable office, in a proper manner, and deſerves the ſerious and minute attention of every grand juror.

The ſubjects, on which the deliberations of the grand jury may be exerciſed, are either *ſuch as are given them in charge, or ſuch as they know of their own knowledge.* The regular way of *giving any matter in charge*, to a grand jury, is by an accuſation drawn up in a certain form, according to the nature of the offence, by the law officer for the proſecution of offences, and given to the grand jury, to be compared with the teſtimony of the witneſſes to ſupport it. This is called an indictment,

* 2 *Burr*, 1088. † 2 *Hale's P. C.* 161, *Hargr. Co. Lit.* 155, *a.* 3 *Bac. Abr.* 232.

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or, more ſtrictly ſpeaking, a bill, and when the grand jury have found it true, then an indictment.* If the grand jury, *of their own knowledge*, or the knowledge of any of them, or from the examination of witneſſes, know of any offence committed in the county, for which no indictment is preferred to them, it is their duty, either to inform the officer, who proſecutes for the ſtate, of the nature of the offence, and deſire that an indictment for it be laid before them; or, if they do not, or if no ſuch indictment be given them, it is their duty to give ſuch information of it to the court; ſtating, without any particular form, the facts and circumſtances, which conſtitute the offence. This is called a preſentment. But the perſon ſo accuſed cannot be called to anſwer to this, till it is drawn up in form; which it is the duty of the officer for the proſecution to do.‡ The beſt way to do this, is to draw up a formal indictment, and preſent it to the ſame jury, for their ſanction. But if the preſentment ſtate all the material facts and circumſtances, I ſee no reaſon why ſuch indictment, coupled with this preſentment of the jury to the ſame effect, ſhould not, without any ſubſequent examination and approbation by a grand jury, be ſufficient, and I believe it would be ſufficient, to call on the party to anſwer it.

The accurate interpretation, in its true extent, of the *diligent enquiry, and true preſentment*, which the grand jury is ſworn to make, has not been preciſely agreed on by learned men. Some, conſidering the expence, ſhame, and ſuſpicion of guilt, brought on the perſon charged by a bill to which a grand jury has aſſented; conſidering the duty implied in the oath *diligently to enquire and truly* to preſent, by which every grand juror is bound; conſidering that all the witneſſes to the accuſation may be produced, and that none are produced by the perſon accuſed to contradict the charge; and conſidering that the rejection of a bill by one grand jury is not concluſive, but that it may be again ſent with the ſame or further teſtimony to another grand jury, which may find or reject it, as their judgment of

* *Rex, vs. Brewn.* 1 *Ld Ray.* 592. *Salk.* 376.
‡ 2 *Hawk.* 229. 4 *Comm.* 301.

it ſhall be; are of opinion, that a grand jury ought never to give their aſſent to any criminal charge, but on ſuch aſſurance of its truth, as would be ſufficient, with a traverſe jury, to found a verdict of conviction.*— Others, becauſe the aſſent of a grand jury, to an indictment or preſentment, is only an accuſation, and is not a trial; becauſe it fixes no guilt on the accuſed perſon, but implies only ſuch ſuſpicion, as deſerves further examination, and a future trial of its truth; and becauſe, if abſolute verity were required in the firſt opening of an accuſation, many perſons, whoſe guilt would afterwards be manifeſt, would eſcape puniſhment; have aſſerted, that a grand jury ought to aſſent to an accuſation, on reaſonable grounds of probability.† This alſo may be alledged, that, in countries where the law of England is unknown, there is no grand jury; and proſecutions are inſtituted, when the executive officers think it expedient. Grand juries are intended only as a check on malice and calumny; to prevent proſecutions, where there is no foundation: but it would be perverting the purpoſe of grand juries, if, when there is a rational ground of probability, they ſhould ſtop the ordinary courſe of trial by a traverſe jury. *Sept. Seſſ.* 1792.

Though indictments ought to be framed as near the truth as poſſible, the grand jury ought to diſtinguiſh between truths in matter of fact, and truths in matter of law, which are concluſions drawn from facts; and if the facts are proved, the grand jury ought to find the bill, without taking on them the taſk of deciding whether the bill has drawn true concluſions in law from thoſe facts; this being a ſubject of future examination by the court at the trial by the traverſe jury, or on a motion in arreſt of judgment.

If the grand jury ſhould reject a bill, not becauſe the facts are not proved, but becauſe they do not, in their conception, amount to the crime charged, or becauſe the indictment does not ſtate a crime; this rejection of the bill, excluding the nature of the crime from the eye of the court, excludes the queſtion of law from the examina-

* 2 *Hale's P. C.* 60, 61, 157. 2 *Hawk.* 367.
† 4 *Comm.* 303. 2 *Hale, P. C.* 60, 157.

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tion of that tribunal, whoſe ſpecial province it is; and draws it before a tribunal, whoſe ſpecial province it is to determine facts. On theſe principles, it is ſtated,* that, leſt offences ſhould be ſmothered, without due trial, if it be manifeſt, that one man is killed by another, and a bill of murder is preſented to a grand jury, they ought to find the bill for murder, and not for manſlaughter or inferior homicide; and, when the party comes on his trial, the whole fact may be examined by the court and the traverſe jury. This, it is ſaid, is, in ſome caſes, an advantage to the perſon accuſed. For, if a man kill another, excuſeably or juſtifiably, and be indicted, and the grand jury reject the bill, or return the ſpecial matter, ſo that the priſoner is diſmiſſed, he may, nevertheleſs, many years after, be indicted for murder. But if the grand jury, at the firſt, had found the bill for murder, and the traverſe jury found the ſpecial matter, or in caſe of excuſeable or juſtifiable homicide, not guilty; he can never afterwards be arraigned: perhaps becauſe murder involving in it every inferior kind of killing, a general verdict of not guilty, is a denial of all. However the true ground of this direction to the grand jury, in all caſes of homicide, to find a bill for murder, is that malice, the diſtinguiſhing criterion of murder, not being a matter of fact, but a concluſion of law from facts, is not to be decided on by a grand jury, but left to an open inveſtigation by the court. And if then it do not appear, the traverſe jury will, under the direction of the court, on an indictment for murder, find according to the real caſe, and the priſoner will be diſcharged, or receive ſentence, according to this finding of the traverſe jury.†

Moſt of the reaſons, on which it is contended, that a grand jury ſhould never aſſent to an accuſation, but on abſolute evidence of its truth, have led alſo to a concluſion, that the grand jury, ought to hear witneſſes in defence of the accuſed perſon. Some of the reaſons on the other ſide apply alſo in contradiction to this. I need not therefore repeat what has been ſo recently ſtated;

* 2 *Hale, P. C.* 60. 157—9. † *vid. Rex, vs. Oneby* 2 *Ld. Ray.* 1485. 2 *Str.* 766, *Rex, vs. Huggens,* 2 *Ld. Ray.* 1574. 2 *Str.* 882.

and ſhall only ſubjoin ſome additional arguments, againſt the admiſſion of this teſtimony: premiſing, that though a moſt reſpectable judge of the ſupreme court of the United States, in a charge to the grand jury at a circuit court for Pennſylvania,* ſupported, with much ability, the admiſſion of teſtimony for the defendant, before a grand jury; yet the chief juſtice of this ſtate,† in ſeveral ſubſequent charges, in his next circuit through ſome of the counties, directly contradicted this doctrine, and held it totally unſupported in law. So far as authority can decide this queſtion, I believe the weight of authority is againſt this admiſſion. Antiently it ſeems to have been the practice, to hear no witneſſes in behalf of the priſoner, even before the traverſe jury. In the reign of Mary, it appeared neceſſary, to give expreſs inſtructions to the judges, to hear witneſſes for criminals. Still, being heard unſworn, they were leſs credited, till act 1 Ann, St. 2 c. 9 directed their examination on oath. A trial before a traverſe jury, in criminal caſes, ſeems to have been without iſſue, and like an inqueſt, and even yet, in ſome caſes, it retains ſomething of that nature; for the jury is directed to find things not involved in the iſſue, as flight, goods, &c.‡ Such being the manner of criminal inquiries, even before a traverſe jury, we need not wonder that authority and precedent exclude witneſſes in behalf of the accuſed perſon, from the hearing of the grand jury. *Sept. Seſſ.* 1792.

By the conſtitution of jury trials, it is ſaid, it is the province of the grand jury to aſcertain the probability of an accuſation, whether it is founded on malice and falſehood, or not; and it is clearly the province of the traverſe jury to aſcertain the truth of this accuſation. But if witneſſes, brought forward by the accuſed perſon, were to be heard in his defence before the grand jury, and they ſhould find the charge true, this would approach ſo near to a conviction, that the traverſing of the indictment afterwards, and the trial by the traverſe jury, would appear nugatory, and might be aboliſhed. The finding of the bill would raiſe ſuch an opinion and preſumption of the guilt of the accuſed perſon, as muſt be

* *Judge Wilſon.* † *C. J. M'Kean.* ‡ 4 *Bla. Comm.* 359. 2 *Str.* 775. 4 *Burr.* 2084—5.

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Were admiſſion of teſtimony, in behalf of the perſon accuſed, beneficial, it would not always be applied to the moſt proper objects. The innocent would ſeldom derive benefit from this proviſion. With a conſcience void of offence, and a mind unſuſpicious of accuſation, having no previous notice of the charge, he would come forward without witneſſes; and the inveſtigation, concluded at once, would have the effect of a trial, and be a prepoſſeſſion againſt him. On the other hand, the man conſcious of guilt will watch the moment of his accuſation, come forward with witneſſes, perhaps the partners of his crime, prepared to ſave him, by perjury, from the graſp of the law. Long verſant in guilt, he will become experienced in the arts of evaſion, and have tools conſtantly prepared, to work his eſcape from juſtice.

It belongs to the court only to aſcertain what teſtimony is competent; to the jury only, to aſcertain what teſtimony is credible. But if witneſſes may be produced to the grand jury, by the perſon accuſed, there will be no reſtraint on their admiſſion;* and, contrary to the principles of our judicial proceedings, the jury will decide on the competency, as well as the credibility, of the witneſſes.

Some, entertaining doubts of the propriety of admiſſion of teſtimony for the defendant, but charmed with the liberality of this meaſure, and not entirely ſatisfied with the arguments for the excluſion of this teſtimony, endeavour to ſteer a middle courſe; and, though they approve not of an indiſcriminate admiſſion, will allow, that, in certain caſes, and with the approbation of the court, the admiſſion of witneſſes in behalf of the defendant, before the grand jury, may be proper. In ſome caſes of difficulty or doubt, the court of king's bench have ordered the evidence to be given to the grand inqueſt, at the bar, and in the preſence of the court,

* *This objection ſeems to apply alſo to the manner of receiving witneſſes for the ſtate.*

and have then directed the jury how to find the bill.* In ſuch a caſe, or on a ſpecial application, ſtating the circumſtances to the court, the objections to the admiſſion of teſtimony, in behalf of the defendant before the grand jury, are greatly leſſened. *Sept. Seſſ.* 1792.

In this variety of opinions on an important point, it will become both courts and juries to act with prudence and moderation; and, as the ſame object, public juſtice, is purſued by both, like fellow labourers in the ſame cauſe, they ought to appeal to each other, for mutual help; and with a decent reſpect to the opinions of each other, on the topics proper for each to diſcuſs, juries ought to liſten to courts in matters of law; and courts to juries in matters of fact. Thus inſpiring and poſſeſſing mutual confidence, they ought neither to ſcreen any perſon accuſed of a crime, whoſe conduct reaſonably appears to demand a public examination; nor, by a raſh charge, draw on any innocent man an unmerited imputation of guilt, or unneceſſary apprehenſion of puniſhment.

Clearly, if, on hearing the witneſſes in ſupport of the accuſation, it appear unfounded, or if the jury have ſufficient knowledge of the incredibility of the witneſſes, the bill ought to be rejected. And if there be no abſolute proof, eſpecially in an inveſtigation on one ſide only, the probability or preſumption to ſupport the charge ought to be ſtrong. If it be light or raſh, no motives of public ſafety can juſtify the harraſſing of an individual; the common preſumption of innocence is a ſufficient counterpoiſe, and you may ſafely diſregard an accuſation ſo lightly ſupported. For a grand jury ought to be thoroughly perſuaded of the truth of an indictment, ſo far as their evidence goes, and not reſt ſatisfied merely with remote probabilities.†

By acts of parliament, in the time of Edward VI. in thoſe crimes under the name of treaſon, there muſt either be two witneſſes, or his own voluntary confeſſion, to convict a priſoner. And theſe witneſſes‡ muſt ſwear to the ſame overt act, or one to one overt act, and another to another, of the ſame kind of treaſon.§

* 2 *Hale. P. C.* 159. † 4 *Comm.* 303. ‡ 7 *W.* 3. § 4 *Comm.* 356.

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Of treaſon againſt the United States there muſt be two witneſſes to the ſame overt act.* In perjury alſo, to caſt the balance againſt the oath of the defendant, there muſt be two witneſſes.† In all other caſes, proof by one witneſs is ſufficient.

In moſt public bodies, the opinion of a certain fixed number has the ſame force, as the opinion of the whole. In ſome, a majority; in ſome, a greater portion; in ſome, nothing leſs than the whole, can be conſidered as an expreſſion of their mind. In a traverſe jury, the whole muſt be of one mind. In a grand jury, though unanimity, as in a traverſe jury, is not neceſſary, yet the concurrence of the ſame number twelve is neceſſary, to give force to an accuſation. If twelve do not agree to find a bill true, it is rejected of courſe. If twelve do agree to find a bill true, though all the reſt diſagree, the accuſation is as effectual as if the whole jury agreed to find it true.

When a criminal charge is brought before you, if, after impartial and conſcientious deliberation, it be the opinion of the whole jury, or of any twelve of you, that there is ſufficient reaſon to call upon the accuſed perſon to anſwer to it; the words, *a true bill*, muſt be written on the back of the indictment, and, in name of the whole jury, or a competent number of them, be ſigned by the foreman, with his name, and the word *foreman* added to it. The indictment is then ſaid to be *found*, and the party to ſtand indicted. But if the grand jury, after due conſideration of a bill, and of the teſtimony to ſupport it, are not of opinion, or if there be not twelve or more of you of opinion, that there is ſufficient reaſon to bring the perſon accuſed to a trial; according to the former practice, the word *ignoramus*, that is, we know nothing of it, was written on the back of the indictment; but, now, it is common for the jury to make an abſolute aſſertion, by indorſing the words *not a true bill*, or, (which is the better way) *not found*. And ſuch indorſement, as in the caſe of a true bill, is ſubſcribed by the foreman, with the addition of *foreman* to his name. All preſentments by the grand jury, or

* *Act of Congreſs, 30th of April*, 1790.
† 4 *Comm.* 357.

any twelve of them, are, in like manner, subscribed by the foreman.* *Sept. Sess.* 1792.

In making these indorsements and subscriptions, the foreman acts only a ministerial part; and though he be of an opinion different from that which his subscription certifies, he makes no false attestation; for it is not his own opinion which he certifies, but the opinion of a competent jury. He is but the agent of the jury, and like the president or chairman of any society, he may, and he must, sign their acts; and his subscription testifies their assent, not his.

The duty of grand jurors, *to keep secret the commonwealth's counsel, their fellows, and their own*, has been explained as restraining them from finding any indictment or presentment against any of themselves. This cannot be the meaning of the oath. The word *counsel* must mean the same thing, when joined to the word *commonwealth*, as when joined to the words *their fellows, and their own.* According to this explanation therefore, each juror must be understood to swear, that he will neither indict himself, nor any of his fellows, nor the *commonwealth.* But it would be absurd to swear a juror not to indict the commonwealth. This, therefore, cannot be the meaning of the words. A man sworn of the grand jury is doubtless excused from presenting any offence of his own, not by this clause in his oath, but by a maxim of law, and fixed principle of reason, that *no man is obliged to accuse himself.* But this oath does not, nor do I know any principle that does restrain or excuse any member of the grand jury from presenting the offences of his fellows. It is true, there may be some inconvenience in it, from the necessity of excluding from their counsels, on an information against any of themselves, that person against whom it is made. But I see nothing in this oath to prevent it. What then is the meaning of this clause in the oath? It is plainly this, that each juror will keep secret the accusations made to the grand jury, by the officers for the commonwealth, by any of his fellows, or by himself, and all their proceedings thereon, lest the persons accused should receive notice of their accusation, and

* 4 *Comm.* 305

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flee from juſtice; and leſt a juror, or other informer, ſhould be under reſtraint, in making an accuſation, if every juror were not ſolemnly bound to conceal the informer.

Of all the means which have been deviſed, to prevent ſecrecy and impunity of crimes, calumny and malice in accuſers, and injuſtice and oppreſſion in government, none appear ſo generous and effectual, as a grand jury: where a number of the moſt intelligent and upright of the citizens are aſſembled, from all corners of the county with all the impreſſion of duty on their minds, that a high and important ſtation, and the ſacred ſolemnity of an oath, can impoſe, with all the intereſt, which the free enjoyment of their own lives, property, and good name, can inſpire, to diſcloſe every offence of which they have knowledge, examine every charge, of which they have information, and, free from all ſiniſter motives, to conduct their deliberations, and deliver their judgment, with a ſtrict and impartial regard to public juſtice and the public peace.

With what ſacred care ought we to preſerve inviolate an inſtitution, ſo eſſential to public liberty, ſafety, and peace! So efficacious of liberty has this inſtitution been eſteemed, that an author, reſpectable for his talents and judgment, does not heſitate to point out the trial by jury as a principle, which, ſingly, will preſerve the Britiſh government from that corruption to which all other governments have become a prey, and give to that government an immortality, above the lot of human affairs to attain.*

The preſervation of this inſtitution depends upon ourſelves: and none, but ourſelves, can ſtrip us of this vital ſpirit of our political frame. Violence cannot tear it from us, for we would defend it with our blood, and loſe it only with the laſt faculty of our lives. Government cannot cheat us of it, for we watch it with a jealouſy, too keen for deception. But, gentlemen, an enemy more dangerous and fatal may ſucceed againſt it; we may deſtroy it ourſelves. For I hold it as a maxim of infallible truth, that whenever an inſtitution begins to operate from principles different from thoſe

* 3 *Bla. Comm.* 379.

which ſet it in motion, and with other objects than it was intended to effect, the way is opened to its ruin. Juries are corrupted and deſtroyed, when jurors ſuffer any motives to prevail over truth and the laws, and give their deciſions on any other grounds. *Sept. Seſſ.* 1792.

If, inſtead of truth and the laws, the only conſtitutional grounds of deciſion, grand juries will ſuffer themſelves to be influenced by popular opinions, motives of convenience, or favourite prejudices, I repeat my aſſertion, jury trial is loſt, for its principles are corrupted; and our liberty falls with it. If jurors once conceive themſelves at liberty to violate its principles, for any reaſon, they muſt be the judges of the ſufficiency of the reaſon. Reaſons will vary, from the infinite variety of opinions and times. If they be violated, for one reaſon, to-day, they will be violated, for another reaſon, to-morrow; till, at laſt, the violation will become ſo frequent, and from ſo many cauſes, that there will be a precedent, to juſtify their violation, for any cauſe whatſoever. Courts and juries are ſolemnly ſworn and ſtrongly bound, to judge and determine according to truth, and according to law. If any circumſtances, foreign to theſe, ſeem to require indulgence, our conſtitution has provided for them, by an application to the ſupreme executive power. But judges and jurors cannot juſtify themſelves, by any reaſon, whatever, for breaking down ſo ſacred a tie of conſcience, and ſo eſſential a pillar of our government.

Juſtly then does the oath of a grand jury, with unuſual, lengthened, and repeated care, inculcate a conſcientious diſcharge of this ſacred truſt; the diligence of their enquiry, the truth of their preſentment, their entire freedom from hatred, envy, love, fear, favour, or reward, and the utmoſt exertion of their unbiaſſed judgment and underſtanding, in all the matters, which may come before them, or be within their knowledge. Neither a haſty or careleſs, nor a timid or partial diſcharge of this duty will correſpond with the ſtrong obligations laid on the conſcience by this oath.

The *matters*, which, whether given in charge, or of their own knowledge, are to be preſented by the grand jury, are all offences within the county. To grand juries is committed the preſervation of the peace of the

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Of all acts of violence thoſe are the moſt dangerous, which are committed by private citizens, without authority, to redreſs grievances of a local nature. For theſe are generally committed with deliberation, under ſpecious pretences of juſtice, and the violence and outrage is reduced to a ſyſtem, ſupported by mutual countenance, and boaſted of as patriotic labours. A particular neighbourhood feels an inconvenience, which there are no legal means ready to remove; the inhabitants fly to arms, remove it by force, and call this liberty. A name ſo ſacred impoſes on the imagination, caſts a falſe luſtre on the fouleſt deeds, and men gradually heated by their enthuſiaſm, believe themſelves inſpired with liberty, becauſe they have long ſaid ſo.

This deſerves ſome explanation. There are two kinds of liberty; liberty in a ſtate of nature, and liberty in a ſtate of ſociety and government; the liberty of the man, and of the citizen. In a ſtate of nature, one man has no right of control over another; and every man is free to do as he pleaſes. This natural liberty ſoon becomes intolerable: for, all acting according to their inclination, each man becomes a prey to the paſſions and power of all; life becomes a ſtate of mutual fear, danger, and ſuffering; and the world is peopled only with tyrants and martyrs.

To relieve themſelves from a calamity ſo cruel, the genuine effect of natural liberty, numbers unite, and agree to ſubmit their will and actions to the mutual control of each other. It is no longer a man's own will, but the will of the ſociety or ſtate, that is to guide his conduct, and, when duly declared, be the rule of his obedience. Civil liberty now takes place of natural liberty; men, no longer free to do as they pleaſe, are free only to do what the laws permit, and the will of every individual muſt be conformed to the public will, that is to the laws.

If the laws appear diſagreeable or unjuſt, what means of remedy ought the citizen to uſe? Argument, remonſtrance, a change of repreſentatives, and, if the evil continue, and overbalance the advantage of the government, a ſeparation from the ſtate. But no evil can be ſo great, as that complication of miſchiefs, which reſult from natural liberty oppoſing law. In oppoſing laws, whom do we oppoſe? Ourſelves: for laws flow from the people. But we diſlike them. It may be ſo: What law will pleaſe all? To ſay that no law ſhall be obeyed, unleſs all approve it, is to ſay, that there ſhall be no law, and men ſhall live in the ſtate of nature. Thoſe laws, which we diſlike, have been approved by a majority of the citizens, or they would not exiſt. It is the fundamental principle of a republic, that the will of a majority ſhall govern the whole ſtate. If thoſe laws be the will of a majority, they are intitled to obedience.—If they be not, a juſt remonſtrance, or a change of repreſentatives, will draw forth the true will of the people; and it is impoſſible, that ever force ſhould long be neceſſary, to make the majority do, what the majority wills. If theſe are true (and they are the true) principles of our government, force can never be neceſſary, but to oppoſe the will of a majority, by the will of a ſmaller number, that is to ſubvert the conſtitution, deſtroy the fabrick of civil authority, and bring us back to the ſtate of nature, anarchy, and confuſion. This is an end, which no man will avow; yet, on no other principle, can private force, againſt the general will, be juſtified or ſuppoſed. Every wiſe man will rather ſubmit to the evils of a law, till, by a conſtitutional oppoſition, they can be removed; or, if the removal become hopeleſs, and the evils too great to be borne, withdraw himſelf from a government, which, inſtead of protecting, oppreſſes him. But no conſideration will ever induce him, to have recourſe, for a remedy, to the worſt of all political evils, forcible reſiſtance to the will of a majority. If ever the hand of an individual be lifted up againſt a lawful exerciſe of public authority, the eſſential dignity of government receives a wound, dangerous to the ſtate, and to be cured only by the ſubmiſſion and atonement of the offender. If one man, or one ſet of

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men, may, without conſtitutional authority, aſſume the right of oppoſing the laws, every man, for any cauſe, may do the ſame. If one individual aſſume the right of doing what he pleaſe to another; this other may aſſume the right of doing what he pleaſes to him, and to every one elſe. It is no longer law, reaſon, and juſtice, but force, fraud, and malice, that govern; ſafety and peace, the fruits of civil liberty, are baniſhed with it; and men are reduced again to a ſtate of natural liberty, where each man may do what he pleaſes to all; where, all having liberty, no man can be free, and ſociety becomes a den of thieves, robbers, and cut-throats.

It muſt be matter of regret, to every man of any reflection, that ſymptoms of this dangerous ſpirit ſhould be ſo daringly manifeſted in this county.* There are two cauſes, which have excited, and, in the opinion of many, perhaps, juſtified it. The exciſe, and the county tax for this year. It is not neceſſary for me, to ſay any thing in defence of the exciſe law, in order to ſhew, that oppoſition to it, by force and arms, is fatal to liberty, and juſt government: for, on the principles which I have ſtated, and do ſincerely believe, private force, oppoſing any law, good or bad, is the worſt of all political evils, and productive of the worſt kind of ſlavery, ſlavery to every man, whoſe malice or force may render him dangerous.

I cannot, therefore, but conſider what happened in Waſhington, in the evening of the 24th of Auguſt laſt, as a moſt dangerous inſult to civil government, and deſerving the deteſtation of all good men. About thirty men, armed and blacked, rode through the ſtreets; ſurrounded, entered, and ſearched, the houſe of William Faulkner, with a deſign to ſeize and puniſh the Inſpector of Exciſe, who had advertiſed an Inſpection office at that houſe. In my idea of their crime, it is not neceſſary to take into view their intention, to render their conduct criminal. The ſingle circumſtance, of their coming with their faces blacked, proved their deſign unlawful, and not fit to be avowed; diſcovered a conſciouſneſs of this guilt; and, eſpecially armed, as they were, naturally and neceſſarily, occaſioned diſmay and terror to all peaceable citizens. If thoſe things may be done, for a good purpoſe, they may be done for a bad,

* *Waſhington.*

or a good purpoſe may be pretended. The thing itſelf is criminal, whatever be the object purſued by it. *Sept. Seſſ.* 1792.

The other ſubject of complaint, oppoſition to which has been made in a like forcible manner, is the county tax for this year. The court-houſe and gaol of this county having been burnt down, the commiſſioners, with great deliberation, and after conſulting the laws, and almoſt every man qualified or diſpoſed to give them advice, believed they had ſufficient authority to build a new court-houſe and gaol. A law, paſſed a few years before, authoriſed them alſo to build offices for the preſervation of the public records and papers. With like deliberation and counſel, the commiſſioners believed it their duty, to undertake all the buildings at once, becauſe all were greatly wanted, and there was manifeſt expence, inconvenience, and danger, in delaying them. Unfortunately, one part of the county had then an intention of being ſeparated from the reſt of it; and, therefore, thinking themſelves at liberty to act, as if they were ſeparated, reſolved to refuſe their portion of the tax.— A party of men aſſembled in each of the townſhips of Green and Cumberland, and, by threats and force, took the duplicates from the collectors. This is an act of violence, which no pretence can juſtify. Your duty, therefore, requires from you the ſevereſt animadverſions on its authors, their adviſers, and abettors, who, in the eye of the law, are all guilty. In the caſe of John Pollock, the collector of Green townſhip, there is reaſon to ſuſpect, that he was in colluſion with the perpetrators of the outrage, and voluntarily and of purpoſe ſuffered the treſpaſs. If this be true, it is a groſs miſdemeanor in office, and, as ſuch, preſentable by you.

It muſt be the wiſh of every peaceable man, that the people of thoſe townſhips were better adviſed. Is this a tax of ſuch vaſt burthen, as to induce men to break through all the bands of ſociety and peace? Is any thing more required of that part of the county, than has been exacted from every part of the ſtate; that each part of a county ſhould bear its proportion of the whole current expences, ſo long as it remains in connection with the reſt? Have not moſt of the counties over the mountains contributed to two ſets of public buildings in the county whence they were ſeverally taken; and

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ſome of them immediately before their ſeparation? And is it reſerved for us, to ſet the only example of violence and riot? Are we the only ruffians in Pennſylvania? If the tax be unlawful, are not the courts of law open for redreſs? If it be unjuſt, would the legiſlature be deaf to a remonſtrance? Force can never be neceſſary, in a regular government, but to ſupport a bad cauſe; and the very uſe of force implies, that the cauſe is bad, and that neither law, juſtice, nor reaſon are on its ſide. Was the county of Waſhington to ſuſpend its public buildings, till the determination of the aſſembly on the petition for a new county, ſhould be known; when experience has ſhown us, that ſuch deliberations uſually take up ſeveral years? How long has the queſtion about the diviſion of York county been agitated? Yet it is notorious, that the petitioners had better grounds of hope of ſucceſs two or three years ago, than they have now. In the little time that the public buildings of this county have been delayed, a number of the inhabitants of this town, from a reſpect for juſtice, and for the peace and ſafety of the county, which might be endangered by the eſcape of the priſoners, have been under the neceſſity of keeping guard, every night, for three months paſt. The prothonotary's office of this county is now kept in a ſmall wooden apartment, adjoining the kitchen chimney. The regiſter's office is in the ſame ſituation, and immediately above the kitchen. The ſlighteſt careleſſneſs or reſentment of a ſervant may, with a ſingle ſpark of fire, deſtroy property of more value than twenty court houſes, gaols, and offices, and occaſion endleſs diſputes, and confuſion of debts and titles. Is the amount of this tax ſuch, as a reſpectable part of the county ſhould be willing, for the ſake of it, to ſacrifice their character of peaceable citizens? Two townſhips, far the largeſt in extent and property, and ſuppoſed ſufficient for a new county, pay but one ninth part of the whole tax.

Having thus recommended to your attention thoſe violations of the public peace, I have done my duty. If you, or any of you, know any of the perſons concerned in them, you are bound by the oath which you have taken, and by that duty, which you owe to God and your country, to inform each other of their names

and offences, to deliberate thereon, in full jury, and make a ſolemn and true preſentment thereof to the court. If you do not, "ſin lieth at your door," you violate your oath of duty, and your conſciences are ſtained with the guilt of thoſe men, and the broken peace and laws of your country. *Sept. Seſſ. 1792.*

No. VI.

Separation of different branches of power in a Republic. Duty of Courts and of Juries as to Law and Fact.

A REPUBLICAN government is a complex machine of ingenious conſtruction, where the moving power is controuled by the wheels put in motion by itſelf. A monarchy is ſimple, conſiſting of one power without reſtraint. In a monarchy, the ſovereign poſſeſſes all power, commands all, and is commanded by none: the mouth of the ſovereign being the only ſtatute book, the law is whatever he chooſes to pronounce. But, in a republic, the people give power to their miniſters, to command themſelves: the people: the ſole ſource of authority, and conſcious of their power, have placed guards over their own paſſions, and diſtributed various portions of their power into various hands; wiſely poiſing the different parts, that they may be dangerous to none, but ſalutary to all. Thus the watchful huſbandman, whoſe lands are watered by a ſtream, which, in the ſwell of ſtorms, overflows its banks, ſweeps away his corn, and covers his ſoil with barren ſands; with prudent and patient induſtry, turns its courſe into many channels, which winding through his fields, in ſeparate courſes, break the madneſs of the torrent, and diffuſe, through every part, its beneficial influence. The power of a republic is a gentle and ſteady breeze, which juſt fills every ſail, and moves the veſſel uniformly in its courſe. The power of a monarchy, like a hurricane, carries deſtruction to every oppoſing object. *December Seſſions, 1792.*

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Perhaps I might ſave the obſervation, that, by a monarchy, I mean here a ſtate where one man has authority to make laws, or, in other words, deſpotiſm; and, by a republic, a repreſentative democracy, where power is juſtly diſtributed and prudently exerciſed.

As the ſalutary effects of a republic ariſe from the delegation, and juſt diſtribution of power, it follows, that, where theſe exiſt not, where the whole people adminiſter the government themſelves, or where any one part of the adminiſtration uſurps the power of the reſt, the utility of a republic is loſt, and all the miſchievous effects of a monarchy remain. The faults of both governments are retained, without the virtues of either; and the government, like a fallen angel, becomes a complication of wickedneſs, without any mixture of good.

One will not wonder, therefore, that a people, jealous of their liberties, ſhould, in the formation of their government, uſe the utmoſt caution, to preſerve the operation of each branch of its adminiſtration diſtinct, and uninterupted by any other, or by the people themſelves. Yet a republican government is not a disjointed maſs of various and diſcordant materials, but a regular combination of authorities mutually dependent, a ſyſtem of powers hanging together, nicely fitted to each other, and cloſely connected in their operation. If one is interrupted, all are deſtroyed. They all act upon each other, by the exerciſe of their ſeveral functions on the ſame objects. The people act upon all, by remonſtrance, or removal of their miniſters from adminiſtration. But if ever one branch, ſtepping beyond its functions, uſurps the authority of another, the government degenerates into a tyranny in the uſurping branch. And if ever the people ſeize any of the delegated functions of adminiſtration, or, which is the ſame thing, by menaces, violence, or irregular will, overawe or control their miniſters, in the exerciſe of their functions, the government degenerates into anarchy. Slavery is the conſequence of either: for it is alike ſlavery, though of different kind and degree, when there is no government, and when there is a bad one.

The ſame reaſons, which eſtabliſh the neceſſity of the diſtinct and uncontrolled operation of each branch

of government, eſtabliſh alſo the neceſſity of freedom in the operation of the ſeveral parts of each, where the branches, as they generally do, conſiſt of ſeveral parts. Any mixture, or uſurpation of any of the parts deſtroys the conſtitutional balance, operation, and effect of the whole, and produces confuſion in that branch, and, through it, in the whole ſyſtem. For ſo exactly moderated is the machine, that, whatever deſtroys the balance or effect of one branch, removing its operation on the reſt, gives to ſome one of them a predominancy, and deſtroys the balance and effect of all the branches of the adminiſtration. *Dec. Siff.* 1792.

In every branch of the adminiſtration of government, the people have retained a certain influence. In the making of laws, the moſt important branch of the adminiſtration of government, the people have great influence, from the frequency of elections, and the number of repreſentatives. In the executive branch of government, the influence of the people, though leſs, is yet great. The nature of the duty requires a delegation to a leſs number, and for a greater time. Yet the new appointment, though later returns at laſt, and the delegate, in all his conduct, looks forward to that day, when he ſhall be ſtript of his authority, and can hope for a re-inveſtment, only if his conduct have deſerved it. In no branch of the government have the people retained, in ſome reſpects more, and, in ſome reſpects, leſs influence, than in that to which you and we are now called, the adminiſtration of juſtice.

This branch conſiſts of two ſuperior parts, a court, and a jury. The courts in this ſtate are filled by men, numerous enough indeed, to be a ſufficient repreſentation of the people, but, of neceſſity, far removed from their will; becauſe the nature of their duty frequently placing them between government and individuals, and therefore requiring perfect independence, their appointment is more durable than that of any other branch of the adminiſtration. Juries, ſelected from the people, by an officer of their own election, are ſo numerous, and ſo frequently changed, that they may well be conſidered as the people themſelves, exerciſing this branch of the adminiſtration. The exerciſe of this branch of the ad-

Dec. Seſſ. 1792. miniſtration, by the people, that is, by an abſtract of the people, a jury, has long been viewed as the ſafeguard of our liberties, and preſerved with the utmoſt jealouſy. Danger to it is to be moſt apprehended from two principles, very ſtrong in the human breaſt, the love of money, and the love of power. For I reckon jury trial in equal danger, by uſurping too much power; as by retaining too little. It is in danger from uſurping too much power, becauſe every abuſe of power prepares the mind for its abolition. It is in danger from retaining too little power, becauſe, without exerciſe, the right may be forgotten and abandoned.

The love of money, or a principle of economy, may prove hoſtile to the trial by jury. A deſire to obtain the advantages, without the burden of government, ſometimes ſacrifices liberty to economy. Men enquire not what is free, but what is cheap. This is ſtrongly manifeſted in the encroachments, which are daily making on jury trials. For highly as we prize the trial by jury, and intimately as we know it to be connected with the deareſt principles of civil government, it ſeems to avail nothing, when it ſtands in oppoſition to our ſpirit of economy, or love of money. Every legal method of deciding facts, without the intervention of a jury, is an encroachment on the conſtitutional authority of the people, in the adminiſtration of juſtice. All ſummary convictions, for penalties, before juſtices of the peace, are corruptions of the genuine ſpirit of civil liberty, and invaſions of the people's influence in government. All ſummary proceedings, in actions of debt, are of the ſame dangerous tendency. Yet, in the ſpace of a few years, they have been greatly extended, and the minds of the people ſeem to be fully prepared for farther extenſion, which, by degrees, may have no limit. I fear not this, only from an apprehenſion, that wrong deciſions may be given. Important as the aggregate of ſmall debts in Pennſylvania muſt be to the ſuitors, I look upon it as a light thing, compared to the high political principle involved in this faſhionable progreſs. For, in this progreſs, we may gradually habituate the mind to trials without jury. The ſame principle of economy may lead us to extend this ſummary proceeding to all actions of debt. The ſame principle may tempt us to extend

it to all actions whatever; and, where not only property, but fame, liberty, and life itself, is at stake, the trial may be without jury. Jury trials may be disused, from disuse, may be forgotten, and, this pillar of our liberties being removed, we may forget that we were free. It is remarkable, that, while the people of Pennsylvania, are making such rapid strides to the extinction of jury trials in civil cases, the people of Scotland and of France, who never knew, or have long forgotten, this principle, are labouring for its establishment. So true it is, that we seldom prize a blessing, while we enjoy it. *Dec. Sess.* 1792.

I said also, that the love of power is unfavourable to jury trial, and therefore to liberty, as tempting its possessors to usurp too much, and risk the loss of all. The deprivation of all power is one of the natural consequences of usurpation. If juries, therefore, not content with the exercise of authority intrusted to them by the constitution, will abuse their own, and usurp on the constitutional authority of courts, make the law depend on their changing fancies, or bend to their prevailing passions; and, reducing all law to a state of uncertainty, not less, and perhaps more, dangerous, than a want of all law; introduce a slavery of the most miserable kind, a slavery to the passions and opinions of all, no man will know how to act, so as to remain safe, and every man, in his own defence, will rise up against a jury trial, which cannot be preserved from corruption, and of which the corruption is so dangerous.

Placed between extremes so full of peril, it may be worth our while to enquire, what is the authority in the administration of justice, which the principles of our constitution have intrusted to juries, and what is the strict constitutional authority of courts.

The separate authority of each is defined, in the well known maxim, "*ad quæstionem facti non respondent judices*; *ad quæstionem juris non respondent juratores.*"* I shall be excused for quoting this maxim in a dead language; for, in this language, it is usually expressed. Translating it literally into our own tongue, the maxim is, *To a question of fact, the judges do not answer*; *to a question of law, the jurors do not answer.*

* *Hargr. Co. Lit.* 155, 6. *Foster*, 255—6.

Dec. Seſſ. 1792.

All diſputes are about either law or fact: either whether the facts are as one party aſſerts, and the other denies; or, the facts being admitted or proved, whether they are correſpondent to law, whether the law calls them lawful or unlawful, right or wrong. According as the queſtion is of the one kind or the other, it is to be anſwered by the one or the other branch of the adminiſtration of juſtice. If the queſtion be, whether an aſſertion be true or not, its truth or falſehood is to be determined only by the jury. But, ſuppoſing it true, if the queſtion be what the law ſays of it, whether it be right or wrong, or in what degree it is wrong, it is to be determined only by the court.* According to this maxim, therefore, queſtions of law belong to the court, excluſively of the jury; and queſtions of fact belong to the jury, excluſively of the court.

Startled at this concluſion, neceſſarily drawn from the maxim, in its genuine original form; and jealous for the privileges of a jury, thus rendered, in matters of law, totally dependent on the court; ſome have ſtrenuouſly aſſerted their total independence, even in matters of law, and earneſtly contended, that it belongs to a jury, to judge of the law ariſing on the fact, as well as of the fact itſelf; and have given the maxim, in terms, which, though not ſupporting, do yet leſs oppoſe, their ſentiments, as the words of excluſion are omitted, and, according to them, the maxim is, *that jurors anſwer to queſtions of fact, and judges to queſtions of law.*†

The firſt part of the maxim, that it belongs to the jury only, to judge of matters of fact, is not diſputed: for courts have never contended, that they have authority to ſay, whether an iſſue be true or not; and have always conceded, that this is the proper and excluſive province of a jury, within which, they are not to be diſturbed, if they have evidence, whereon to found their opinion. But as juries have no ground to found any opinion of facts, until evidence of them be exhibited to them; ſo courts have no ground on which to found any

* *Kelyng fined a jury for giving a verdict of manſlaughter, on facts, which as he directed them, amounted to murder. Hood's caſe. Kel.* 50.

† *Eunomus*, 270.

opinion of law, until facts (unleſs admitted) are found by a jury. Law cannot be declared by a court without facts; nor facts, by a jury, without evidence: and courts acknowledge, that offering *evidence* to them is laying no foundation for an opinion of law. For *evidence* muſt be offered to the jury, and, from the evidence, the jury muſt declare the fact, before the court can pronounce the law. And, in ſpecial verdicts, when juries, inſtead of finding facts, have found only evidence of the facts, courts have declined giving any judgment, leſt they ſhould interfere with the province of the jury, and determine fact, as well as law.* Neither is it denied, that it belongs to courts to judge of matters of law; but it is ſaid, that, in this they judge not excluſively, but the jury has a kind of concurrent juriſdiction with them. The duty of courts being thus agreed on; that it is their duty, to judge in matters of law; and that it is not their duty to judge in matters of fact; it is not neceſſary to ſay any thing further on this point; and we may proceed to examine the diſputed part of the maxim, that the jury have *no* authority, to judge of matters of law. *Dec. Seſſ.* 1792.

This diſpute has chiefly ariſen, from the zeal of the people in defending themſelves againſt ſome overſtrained exertions of public authority in Britain, in ſtate trials, particularly in the caſe of treaſons, and yet more particularly in the caſe of libels. In theſe caſes, the line between a neceſſary and dangerous reſiſtance to government, and between the freedom and the abuſe of the preſs, may have ſeemed ſo narrow, and it may have ſeemed ſo important to liberty, that it be well guarded, as to incline jurors to be afraid of truſting its guardianſhip to a judiciary dependant on the crown; to paſs beyond the limit, and retain or uſurp more power, in theſe caſes, than may accord with ſtrict conſtitutional principles; and, in order to juſtify their uſurpation, in theſe caſes, to contend for like authority, in all caſes whatever.

Thoſe, who, in oppoſition to this claim of juries,

* *vid.* 5 *Bac. Abr.* 285-6, 312-3. 10 *Co.* 56-7. 1 *Str.* 85. 1 *Wils.* 56. 5 *Burr.* 2669, *Kel.* 109.

Dec. Seff. 1792.

would limit them to matters of fact only, and deny them any kind of authority in matters of law, argue on these principles.*

1. From the nature of juries compoſed of the people, taken indiſcriminately from all ranks, profeſſions, and trades, by turns, and for a ſhort ſervice, it is impoſſible, that they ſhould be qualified, to decide nice queſtions, in an abſtruſe and intricate ſcience, as the law of England is, and as all laws, in length of time, become. And it is not to be ſuppoſed, that any juridical conſtitution, would veſt the interpretation and declaring of laws, in bodies ſo conſtituted, without permanency, or previous means of information, and thus render laws, which ought to be an uniform rule of conduct, uncertain, fluctuating with every changing paſſion and opinion of jurors, and impoſſible to be known till pronounced. The only means of information, that jurors can have of the law, are the ſtatements of the advocates on both ſides, or the declarations of the court. The ſtatements of the advocates will, if poſſible, be contradictory, and always intereſted; and it can be only from the declarations of the court, that the jury can take the law.

2. The duty of a jury may be learnt from their oath, "well and truly to try the iſſue joined, and true verdict give according to the evidence. "*The iſſue joined*, or the point in diſpute, which is ſubmitted to the trial of the jury is matter of fact; the rule according to which they are to give their verdict, is *the evidence*, evidence is always applied to fact; for it was never heard, that evidence was given of the law, or that it was ſubmitted to the jury, to find what the law is.†

3. In the courſe of the trial, if an incidental queſtion of law, not involved in the iſſue, occur; as reſpecting the competence of witneſſes, &c. it is decided by the court only, and to it the jury have nothing to ſay. And the very iſſue itſelf, by an application for a nonſuit, for want of evidence, or by a demurrer to evidence, may be entirely withdrawn from the jury, and given up to the deciſion of the court alone.

* *Eunomus* 270-9. *Hargr. Co. Lit.* 155-7.

† 5 *Burr.* 2669. 2 *Burr.* 1216—28. 1 *Bla.* 295—300.

4. If the jury, in their verdict, ſtate the facts, and draw from them a concluſion, different from that which the law would draw; the court will alter this concluſion, and make it conformable to law.* And if the jury, either of themſelves, or conforming to a miſdirection of the judge, find a verdict, implying facts, of which no evidence was given at the trial; or if they ſtate facts, legally inconſiſtent with their verdict; the court will ſet this verdict aſide, for want of facts to warrant the legal concluſion implied in the verdict. Courts have even gone ſo far, where an intricate queſtion of law was involved with the fact in a general verdict, as to ſet aſide this verdict, becauſe the jury refuſed to find a ſpecial verdict, which, ſtating the facts only, leaves the law to the deciſion of the court.†— Courts would have no power to do theſe things, if juries may decide law as well as facts. *Dec. Seſſ.* 1792.

5. That the province of juries is to decide only matters of fact, appears from this; that, when law only is concerned, the queſtion never goes to a jury. Thus, in demurrers, ſpecial verdicts, and caſes ſtated; either by conſent, or without conſent of the parties, or by admiſſion of the jury; is it acknowledged, that it belongs to the court only, to determine matters of law; and that juries are called only to decide matters of fact. Wherever the facts are acknowledged, as in a demurrer; or agreed, as in a caſe ſtated; or proved, as in a ſpecial verdict, there is nothing for a jury to do: the court decides according to law. Till the facts are found or admitted, courts have no ground to go on: after the facts are found or admitted, no room remains for the interference of a jury; unleſs it be neceſſary to aſcertain alſo the conſequences of the facts, as in the caſe of damages, in doing which they are ſtill within the province of fact, and not of law.

Such are ſome of the reaſons, on which it is contended, that juries have no authority, to decide queſtions of law. Indeed, if to their authority of deciding on fact, were united that alſo of deciding on law, the power of

* 1 *H. H. P. C.* 471.

† *King, vs. Pole, (caſes B. R, temp. Ld. Hardw.* 26) *Hargr. Co. Lit.* 156, *b. vid.* 1 *P. Wms.* 212, 3.

Dec. Seſſ. 1792.

courts would be annulled. Courts would become mere regulators of form, and, in matters of ſubſtance, only adviſers: their authority, and, with it, all uniformity of law, would be proſtrated to the paſſions or prejudices of juries, unexperienced in the conſequences of their own deciſions; all rules of action and property would become precarious or ineffectual, and the ſalutary mutual reſtraint of two authorities, in this branch of government, would be deſtroyed.

In oppoſition to theſe arguments, ſo far as I have obſerved, only one reaſon has been offered, of any conſiderable force. This is, that, in the iſſue, eſpecially if it be a general iſſue, both law and fact are involved; the jury, by finding a general verdict, either for the plaintiff or the defendant, which (under the peril of an attaint, or of having their verdict ſet aſide) it has never been denied, they may do,* may decide both the fact and the law, and leave nothing to the court, unleſs there be room to impeach the verdict, but the mere formality of giving judgment. And, perhaps, in the hiſtory of England, there may have been times (though, ſince the independence of the judges, ſuch times no longer exiſt) when, in ſtate proſecutions, eſpecially for treaſons and for libels, it may have been neceſſary for the liberty of the people, to claim and exert this important check on a ſtanding body of men, ſo liable to undue influence from the crown, and ſo influential on the happineſs of the people, as the judges were.

The concluſions, which I would draw, from theſe arguments on both ſides, are theſe—Strictly and properly, it belongs only to courts, to decide all queſtions of law. But, wherever, in any iſſue, the law is involved in the fact, the jury may decide both, by a general verdict. But the doctrine of attaints, and of new trials, proves, that they do this at their peril, and under the control of the court. In trials, it is the duty of judges, for the aſſiſtance of the jury, to ſeparate the law from the fact; ſumming up the evidence, to ſubmit the facts, of which there is evidence, to the deciſion of the jury; and, making the various ſuppoſitions, that can be made, of the different ways, in which the facts may be found,

* *Litt.* § 368. *Co. Litt.* 228. 5 *Bac. Abr.* 284.

to declare the law ariſing out of each; and to charge the jury, if they find the facts in this manner, the law dictates, and they ought to find, this verdict; if they find the facts in that manner, the law dictates, and they ought to find, that verdict; or, if there be difficulty in point of law, they may, or they muſt, find a ſpecial verdict, which, ſtating the whole facts on the record, may claim the deciſion of the higheſt legal authority.— In the diſcharge of their ſeveral duties, mutual reſpect is due between courts and juries. It is incumbent on courts, to yield all poſſible deference to the opinion of juries, in matters of fact; and it is incumbent on juries, to yield all poſſible deference to the opinion of courts, in matters of law. Acting thus, courts and juries mutually check the extravagancies of each other, and generally produce moderation and juſtice. But, if they act otherwiſe, if courts take upon them to think differently from juries, in matters of fact properly before them; or if juries take upon them to think differently from courts, in matters of law; they deſtroy this balance, and mutual check; one branch uſurps the authority of both; the other becomes a mere nullity; there no longer remains any uſe for a court and a jury; courts may decide facts, without juries, or juries decide law, without courts; there no longer remains any reſtraint on extravagance of opinion; the conſtitutional balance of this branch of government is deſtroyed; the deſtruction of the balance in this branch, deſtroys the balance in the whole ſyſtem of government; and thus a way is laid open for the deſtruction of the government itſelf.

Dec. Sess. 1792.

No. VII.

Perſons exempted from Puniſhment as incapable of Offence. Manner in which Offenders may be Guilty.

March Seſſions, 1793.

OFFENCES, crimes, or miſdemeanors, are violations of ſome public law, or omiſſions or abuſes of ſome public duty, in which the peace, authority, or intereſt of the whole community is concerned; and they are thus diſtinguiſhed from injuries, or violations or omiſſions of ſome private duty, by which individuals alone are affected. An offence generally implies an injury and ſomething more: for in moſt, if not all, public offences, an injury to ſome individual is involved.

To diſtinguiſh them minutely, an offence may be conſidered as the general word, including both crimes and miſdemeanors. A crime is an offence of a higher nature, or capital. A miſdemeanor is an offence of a lower kind, and not capital.*

Public laws are general rules preſcribed for all the citizens. It muſt not be left a matter of indifference, whether laws be obeyed or not; but ſanctions muſt be annexed to them. Hence come puniſhments, which are evils or inconveniencies, following the breach of a public law, or omiſſion of a public duty.

Taking the will for the deed, an attempt to commit a crime was antiently held equivalent to its actual commiſſion. But this doctrine has long been exploded; and, to conſtitute the crime, the intention muſt be carried into effect.

As, to conſtitute an offence, there muſt be an evil intention, and an unlawful act; there can be no offence, where there is no will to do evil. Want of will to do evil may proceed from want of judgment, or from want of liberty. For, there can be no will to do evil, where there is no judgment to diſcern between evil and good; nor can any will to do evil be imputed, where no choice of conduct is left, and the agent acts from neceſſity. Puniſhments being conſequences of crimes, thoſe cir-

* *Woods's Inſt.* 344.

cumſtances, which conſtitute crimes, are neceſſary to render puniſhments lawful: to ſubject a man to puniſhment, for the breach of a law, or the omiſſion of a duty, he muſt have diſcretion of mind, to know the law and his duty, and freedom of will, to follow this diſcretion; and no man, therefore, can be either convicted or puniſhed, who wants either judgment or liberty. *March Sess.* 1793.

Want of diſcretion may be either voluntary, as in the caſe of drunkenneſs; or involuntary, as in the caſe of infants, idiots, and lunatics.

An infant, under the age of ſeven years, is conſidered by the law as altogether incapable of knowledge or diſcretion; therefore capable of no offence, and liable to no puniſhment. Above the age of ſeven years, this preſumption may, in ſome caſes, be controverted: the law diſtinguiſhes between his actions. From that age, till the age of fourteen, he ſeems to be liable to puniſhment, only for capital offences. And, even in the caſe of a capital offence, an infant, though above the age of ſeven, if under the age of fourteen years, is preſumed incapable of diſcretion, unleſs ſtrong circumſtances of cunning and malice equivalent to natural diſcretion, be manifeſt, to prove the contrary. Above the age of fourteen, an infant, being preſumed of ſufficient diſcretion, to know their enormity, is liable to puniſhment for all capital offences, and for notorious breaches of the peace, as riots, aſſaults and batteries, &c. but in ſome caſes of common miſdemeanor, eſpecially in caſes of omiſſion, an infant, having no command of his fortune, is exempted from fi[ne] and impriſonment.

Idiocy, implying a total and permanent abſence of reaſon, deſtroys all reſponſibility in the unfortunate ſubject of it; and an idiot is never puniſhed for any crime whatſoever. Lunacy, while it exiſts, equally excuſes from puniſhment; but, as it admits intervals of reaſon, for an offence committed in a lucid interval, a lunatic is anſwerable.

To this head may perhaps be referred that temporary madneſs, ariſing from ſudden paſſion, which, when reaſonably provoked, and n[o]t exceeding the uſual frailty of human nature, though it does not juſtify, ſometimes extenuates, the crime, and leſſens the puniſhment.

* 3 *Reeve's Eng. Law.* 413. 4 *Comm.* 21.

March Sess. 1793.

Misfortune, accident, ignorance, or miſtake, under certain circumſtances, implying a total abſence of will to do evil, are alſo grounds of excuſe. But the man, who would excuſe himſelf, for an offence committed by accident or misfortune, muſt have been engaged in a lawful act, when the accidental miſchief happened.—For, if he was doing an unlawful act, he is anſwerable for all its conſequences, and, therefore, muſt anſwer for the accidental miſchief, which it produced. So alſo the ignorance or miſtake, which excuſes, muſt be ignorance of fact; for ignorance of law excuſes no man. A man may be excuſed, if, doing what he lawfully might do, he, through miſtake, does an unlawful act. But, if a man, believing that he has a right, which, in fact, he has not, intentionally does an unlawful thing, believing it lawful, he is not excuſed. If every man were not preſumed to know the law, guilt could not be detected.

Voluntary want of diſcretion, as that produced by intoxication, though depriving the agent of the principle of reſponſibility, yet, being the effect of his own voluntary act, and what may be procured on any occaſion, and for any purpoſe, leaves him anſwerable, both for that, and all his conduct, while in that ſtate of mind.

Want of liberty excuſes for offences committed by conſtraint. This conſtraint may be either natural or civil.

Civil ſubjection, of certain kinds, excuſes for ſome offences, though not for all. The principal caſe of this kind is that of a wife committing an offence by the coercion, or the command, or in the preſence, which is conſidered as the command, of her huſband. But the offences committed by a wife, for which ſhe is excuſed, on the principle of ſubjection to her huſband, are thoſe committed againſt the laws of civil ſociety. For offences againſt the laws of nature, as murder, and the like, (unleſs in the caſe of acceſſories after the fact*) are not excuſed, by this civil ſubjection. And even offences againſt the laws of civil ſociety (which, creating this ſubjection, excuſe the infractions of them occaſioned by it) are not all excuſed. In the higheſt offence as trea-

* 1 *Hale's P. C.* 621.

ſon, which violates an obligation yet ſtronger than the conjugal tie, and in the miſdemeanor of keeping a brothel, which is uſually committed by the agency of her ſex, and could not be reſtrained, if this impunity were general, the wife is not excuſed, by her marital ſubjection. *March Seſſ.* 1793.

The civil ſubjection of a ſon to a father, and, in England, where ſlavery exiſts not, of a ſervant to his maſter, is no legal excuſe from puniſhment. But ſlavery, being a ſpecies of civil ſubjection, at leaſt as ſtrong as marriage, ought to extend to the ſlave, the ſame exemption, that marriage extends to the wife.

A ſimilar privilege of excuſe from puniſhment, is allowed to thoſe, who commit offences by natural ſubjection; as when conſtrained by ſuperior force, and well grounded fear of death, or bodily harm.* But neither does this privilege extend to heinous offences againſt the laws of nature, as the murder of an innocent perſon, which even the fear of death will not juſtify.

Having thus conſidered the perſons, who, as incapable of crime, are exempted from puniſhment, we may now conſider the manner, in which each perſon, capable of crime, may be conſidered as offending.

A man may be guilty of an offence, either as a principal or as an acceſſory.

Principals are in two degrees. A principal in the firſt degree is he who is the actor or abſolute perpetrator of the crime. A principal in the ſecond degree is he who is preſent, aiding and abetting the fact to be done; whether he be immediately preſent, as within ſight or hearing of the fact; or conſtructively preſent, as keeping watch or guard, at ſome diſtance, while another commits the offence. Aiding and abetting are eſſential: for, if ſeveral combine to do an unlawful act, and one, without the knowledge of the others, do a different unlawful act, not in proſecution of the firſt, nor the natural conſequence of it; the others are not principals in this act, to which they gave no approbation.† But where there is no immediate perpetrator, or none capable of an offence, as where a man makes uſe of a madman, a wild beaſt, a trap, poiſon, or the like, to commit a crime;

* 1 *Hale's P. C.* 50. *Foſter* 14. † *Kel.* 112—18.

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though he be not preſent, when the very deed is done, he is guilty, as a principal in the firſt degree; for there is no other criminal, much leſs ſuperior in guilt, whom he could aid or abet.*

Formerly, principals in the ſecond degree were conſidered only as acceſſories; but now, to permit their trial, while the facts are recent, though the perpetrator ſhould not be amenable, they are conſidered as principals; and an acceſſory is one, who, being neither an actor in the offence, nor preſent at its commiſſion, cannot be a principal, either in the firſt or ſecond degree, but is yet ſome way concerned in it, either before or after the fact.

An acceſſory before the fact is he, who, without being preſent, or aiding and abetting, at its perpetration, encourages, counſels, or commands the perpetration of a crime, either by influencing, or procuring others to influence the perpetrator; or who, knowing the intention of perpetrating a crime, furniſhes aſſiſtance, or means of its perpetration; or who, by ſhewing an expreſs liking, approbation, or aſſent to the felonious deſign of another, abets and encourages him to perpetrate it.† And he is not only acceſſory to the crime, which he thus procures, but to all its probable conſequences; as if one inſtigate another to beat a third perſon, and he beat him ſo that he dies, the actor is a principal, and the inſtigator an acceſſory in murder. So alſo, if one inſtigate another to commit a crime, and, yielding to that inſtigation, he commit a crime, in ſubſtance, the ſame, though different, in manner (as if to ſhoot a man, and he ſtab him) the inſtigator is an acceſſory to the crime actually committed. But if the crime actually committed be different in nature from that procured; the inſtigator is acceſſory only to the crime which he procures: as, if one procure another to burn a houſe, and, in doing it, he commit a robbery; the actor is guilty, as a principal, both of the burning and the robbery, but the inſtigator is acceſſory only to the burning; for it was not his counſel, but the wicked mind of the actor, that ſuggeſted the robbery.‡

* *Kel.* 52—3. † 2 *Hawk.* 445.
‡ *Foſter* 372. 4 *Comm.* 37.

An acceſſory after the fact is he, who, knowing of the commiſſion of a crime, at which he was not preſent, nor aiding or abetting, receives, relieves, comforts, or aſſiſts the criminal. The crime muſt have been compleat, previous to the aſſiſtance given to the criminal; otherwiſe the aſſiſtant is not an acceſſory: as, if one wound another, and after the wound given, but before death enſue, a perſon aſſiſt the delinquent, he is not an acceſſory to the homicide; for he could not know, that it was an homicide, till the death enſued. *March Seſſ.* 1793.

To relieve a felon with neceſſaries or conveniencies, while in gaol, or in the cuſtody of the officers of juſtice, or under bail for his appearance, can be no offence; for the aſſiſtance, which is criminal, muſt be of a nature tending to the hindrance of juſtice, by the eſcape or concealment of the offender; as furniſhing him with a horſe, to eſcape from his purſuers, money or victuals, to ſupport him, in his flight or concealment, a houſe, to ſhelter or conceal him, force, to reſcue him, or inſtruments, to break the gaol, or bribing the gaoler, or, in a gaoler, being bribed, to ſuffer his eſcape.

Except in the caſe of a wife aſſiſting her huſband, which ſhe is bound to do, or by his coercion aſſiſting any other felon; and, on the ſame principle, of a ſlave aſſiſting his maſter; ſuch aſſiſtance, as makes an acceſſory after the fact, is equally criminal, whatever relation may ſubſiſt between the felon and the acceſſory. For a ſon, to aſſiſt his father, or a father his ſon; a maſter his ſervant, or a ſervant his maſter; or even for a huſband to aſſiſt his wife, to elude juſtice for a crime; however excuſable in point of conſcience, is, in the eye of the law, as criminal, as the ſame aſſiſtance to a ſtranger. An unfortunate neceſſity, that civil obligation ſhould be oppoſed to the dictates of nature!

In offences committed without premeditation, as manſlaughter, or homicide by chance or misfortune, there can be no acceſſory before the fact: their nature excludes any counſel, command, or procurement. And it is a rule of law, that in treaſon, the higheſt of all offences, the heinous nature of the crime ſeeming to render all participation in it worthy of the greateſt indignation and puniſhment; and in miſdemeanors of

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inferior kind, as treſpaſſes, riots, forgery, and petit larceny; becauſe the law will not readily deſcend to nice diſtinctions, in very ſmall matters; there are no acceſſories; but all concerned are principals.* But, in ſome kinds of treſpaſſes, there appears a difference between a connection with the offence before and after its commiſſion.† In general, acceſſories can only be between thoſe extremes of the higheſt and loweſt guilt; for, whatever would make an acceſſory in felony, in them, makes a principal.

As no man can be an acceſſory, unleſs an offence has actually been committed, the common law, like common juſtice, directs, that, though the conviction of the principal may be controverted by the acceſſory, yet the acceſſory cannot be tried (unleſs together with the principal) till after the conviction of the principal.‡ And if an offence which excludes acceſſories has been committed; and one be charged with it, in a manner, which, in another ſort of offence, would make him only an acceſſory, but, in this, a principal; this difference being only artificial, the ſame rule of natural juſtice requires, that the real principal be firſt convicted, before this artificial one, who, whatever name may be given to him, is, in fact, but an accomplice, ſhould be put upon his trial. For otherwiſe, after this man, who muſt either be not guilty, or leſs guilty than the principal, has been puniſhed; it may appear, that no crime has been committed, or the perſon principally guilty may eſcape.‖ Statutes have, in ſome caſes, altered this, and directed proſecutions againſt the acceſſory, independent of the principal, as for a miſdemeanor.¶

A man indicted as acceſſory, and acquitted, may, afterwards, be indicted as principal. And a man indicted as a principal, and acquitted, may, afterwards, be indicted as an acceſſory after the fact, if not as an acceſſory before the fact. For the offences are, in the eye of the law, ſpecifically different; and, therefore, a ſtrict rule of law, reſpecting the ſame offence, cannot avail to obſtruct juſtice.**

* 2 *Hawk.* 439.
† *Ib. Cro. El.* 824.
‡ 4 *Comm* 40, 324. *Foſter* 365.
‖ *Ib.* 343. 1 *Hale P. C.*
¶ 1 *St L.* 138. 3 *St. L.* 120.
** 4 *Comm.* 40, *Foſter* 361, 2 *Hawk.* 373, 1 *Hale P. C.* 625.

In point of conſcience, there may ſometimes, be no difference between the guilt of the acceſſory before the fact, and of the principal. The adviſer may even be the moſt wicked. And yet, in point of policy, the puniſhment of the principal may be rendered greater, to make it more difficult for the contrivers of miſchief to find inſtruments. In point of conſcience, there ſurely is a difference between the guilt of the principal, or of the acceſſory before the fact, and that of the acceſſory after the fact, whoſe offence may proceed only from pity for the unfortunate ſituation of the criminal; yet, in point of policy, it may be neceſſary to make him equal in puniſhment, to render it difficult for offenders to eſcape from juſtice. In point of law, they were all formerly conſidered as equal in guilt and puniſhment; but ſubſequent ſtatutes have made diſtinctions, according to the real or ſuppoſed principles of policy and juſtice.* *March Seſſ.* 1793.

We have now conſidered the perſons, who are capable of offence and liable to puniſhment, and the manner in which each offender may be conſidered as guilty; and we are therefore prepared to proceed to a catalogue and definition of thoſe offences, againſt which our laws denounce puniſhment.

* 2 *St. L.* 803, 4. 4 *Comm.* 39.

No. VIII.

Obſervations on the Duty of a Grand Jury.

YOU have been juſt ſworn to the exerciſe of a very important part of the adminiſtration of public juſtice, and now ſtand in the middle between the citizen and the laws, as the ſafeguard of both. *June Seſſions,* 1793.

The firſt conſideration to be impreſſed on your mind is that this is a public office of the utmoſt concern to the fortune, good name, and life, of your fellow citizens,

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and to the peace and government of the ſtate; that it is reſpectable, in proportion to its importance; and honourable, as a gratuitous exerciſe of part of the ſovereign power. It lies with you, to ſuffer the public laws to be violated with impunity, or to ſupport them with dignity and reverence. It lies with you, to bring the criminal to juſtice, or to ſcreen him from animadverſion. It lies with you, to protect and juſtify the innocent man from falſe ſuſpicions, or to yield him up to oppreſſion, and the prejudice and rage of the day. And, without impiety, to uſe an alluſion to divine omnipotence, under the controul of God, the laws, and your own conſciences, "the iſſues of life and death are in your hands."

This conſideration of the importance and dignity of the duty, which you have now undertaken, is, of itſelf, ſufficient to awaken your utmoſt attention to the conſcientious diſcharge of it, to ſwell your ſenſe of the weight and value of your preſent office, and, in your feelings, to furniſh you with a ſtandard, by which to meaſure your actions in this public capacity. To this ſacred tie of honour and public duty, is ſuperadded the ſolemn obligation of religion: you have, by oath, appealed to the Supreme Being, to judge of the integrity of your deliberations and preſentments; and this truſt is one of thoſe, of which you muſt give an account, at the great day.

Such is the nature of your preſent office, that it is not thought ſafe, to delegate its powers to any particular perſon, or permanent body of men; but only to a jury, a juſt repreſentation of the people themſelves, impartially collected, and frequently changed. For, even to an impartial repreſentation of the people, this power is intruſted, only occaſionally, and for a ſhort period.

The rule of your enquiries is *what is true, and what is lawful.* Of the truth of any fact alledged, you are the ſole and excluſive judges, on the evidence before you; and, in this, may exerciſe your official diſcretion, governed only by your conſcience and duty. Thus are ye to eſtabliſh your belief, and, according to your belief, are ye to find and report the facts alledged againſt any of your fellow citizens. You are not bound to declare any thing true, becauſe it is poſitively ſworn to, if, from the character of the witneſſes, or the ground

on which they viewed the object, and formed their opinion, or from the circumſtances attending the tranſaction, you have reaſon to believe, that it is falſe. The truth of facts, and the credibility of witneſſes, are wholly in your hands. *June Seſſ.* 1793.

But if you *believe* the facts alledged, your opinion whether they are *lawful* or not, is not arbitrary, or in your own power; but is ſubject to the judgment of the court, under whoſe direction you act. Viewing courts as the proper organs of the law, you ought to receive their opinions, on what is lawful or unlawful, with that deference, which is due to conſtitutional authority, and profeſſional knowledge.

The conſequences of a crime, either to the offender or to others, whether the law has provided for it a proper puniſhment, or whether the offence be popular or not, are no conſiderations of yours. Theſe belong only to courts, to the executive authority, having a power to pardon, and to the legiſlature. You have only to enquire, whether the perſon accuſed has committed the offence, of which he is accuſed. If you have reaſon to believe, that he has, you are bound, by your duty to ſay ſo, whatever the conſequences to him may be. I have known a grand jury refuſe to find a bill, becauſe they thought the offender ſufficiently puniſhed, by his previous impriſonment. Was not this uſurping the power of the court, and of the ſupreme executive magiſtrate, and taking upon them to declare the fact no offence, or to grant a pardon? Every man in office ought carefully to keep himſelf within the bounds of his conſtitutional authority; and juries, a ſelection of the people themſelves, ought to beware of encouraging, by their example, official uſurpation. Truth and law ought ſolely and entirely to govern your determinations.

As to the jury only, it belongs, to determine what witneſſes, it is proper to believe; to the court only, it belongs, to determine what witneſſes, it is proper that the jury ſhould hear. The jury therefore ought to hear no witneſſes, who are not ſent to them under the ſanction of the court; and witneſſes are ſworn by the court, or ſome judge thereof, before they are ſent to the jury, to give teſtimony. But ſometimes you will find men,

June Seff. 1793. who have ſo little ſenſe of duty, regard for the conſtitution of their country, or reſpect for the office and character of a juror, that, when any queſtion, in which they are intereſted, is before a grand jury, they will mix with jurors out of doors, enter into converſation with them, or in their hearing, about the matter under examination, inſinuate or declare what they wiſh believed, and endeavour to influence the judgment, and even ſolicit the votes of the jurors, in favour of the ſide they take. Such men are corrupters of judicial integrity, and traitors to the laws of their country; and an honeſt juror, collecting a ſenſe of the dignity, importance, and truſt, of his ſituation, will addreſs them thus:—"Begone, deceivers, you muſt have ſome bad end in view; for if what you ſay were true, and proper for me to hear, you would come forward as witneſſes, and give your ſentiments on oath, in the preſence of the whole jury: it is in this manner only, that my office will permit me to receive information." It is a good rule for the conduct of jurors, to liſten to no converſation, whatever, out of doors, on any ſubject before the jury; never to ſpeak of it themſelves, but in full jury; and to avoid all, who would lead them into any converſation on ſuch ſubject. And to me it appears, that their duty and oath bind them to ſuch reſerve, and that a ſenſe of their dignity will lead them to a full practice of it.

It ſeems ſuperfluous to ſay, that a juror muſt be no reſpecter of perſons; that, in judgment, he muſt know nobody, but decide alike of friends and foes.

Reflect on the dignity and importance of your preſent ſtation, acting on the laws, liberties, and privileges of your country, and let your conduct be regulated by the impartiality and independence correſponding to ſuch ſentiments. You are to conſider yourſelves as the guardians of the laws, and of the rights of your fellow citizens, and bound, carefully to preſerve both from injury or encroachment. No conſiderations ought to induce you, to omit preſenting every offence known or proved to you; and no conſiderations ought to induce you, to ſanction a charge, for which there is not a ground of belief. To ſay nothing of your own guilt, in violating your oath and duty; overlooking offences will

render breaches of the law common, defeat the ends of juſtice and laws, relax the authority of government, and introduce general corruption and violence. Haſtily to ſanction unfounded accuſations, renders you inſtruments of oppreſſion, and converts government into a cruel tyranny; a tyranny the more cruel and hopeleſs, as it is exerciſed by the people themſelves. Truth well aſcertained, and law impartially adminiſtered, ought to be your preſent aim and purſuit. *June Seſſ.* 1793.

As your office is but temporary, and you will ſoon deſcend from it into the common rank of citizens; let me exhort you, in the words of ſcripture, "judge not, that ye be not judged; and do to others, what ye would have others do to you;" ſtill guided by your conſcience, your duty, and your oath. As ye would not yourſelves be made the object of a falſe accuſation, accuſe no man falſely. As ye would not have an injury done to yourſelves paſs with impunity, ſuffer no offence againſt the laws, and any of your fellow citizens to paſs with impunity. Uſe not your preſent office, as an inſtrument of malice to your enemies, or as a vehicle of favour to your friends. But let your deliberations be guided by truth and law; and let your conduct in this temporary office be ſuch, as to be ſpoken of with approbation, and be a model and example to thoſe, who ſhall ſucceed you in the diſcharge of it.

Beſides your duty, reſpecting criminal law, an act of aſſembly* gives authority to the grand jury, to concur with the county court and commiſſioners, in directing the building of bridges within the county; and with them and the grand jury, court, and commiſſioners, of any adjacent county, in directing the building of bridges on a ſtream dividing the two counties.

A kind of cenſorial authority is ſometimes exerciſed by the grand jury. Viewing themſelves not as the repreſentatives, but as a reſpectable collection, of the people of the county, they conſider it proper to expreſs, in a public manner, their united ſentiments of public inconveniences, improvements, or other tranſactions, meaſures, or things, of a general nature, and affecting the welfare of the county, or on which it is proper for

* 1 *St. L.* 283

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their voice to be known; expreſs praiſe or blame, according to their nature or tendency; and ſuggeſt or recommend the proſecution of public benefits, and redreſs of public greivances. In this, they act not in their official capacity; nor is the exerciſe of this authority founded on any law. This authority is founded only on uſe, and a preſumed public convenience; and, when exerciſed diſcreetly, it may be attended with good effects. The want of public buildings, for inſtance, in this county,* appears to me a great inconvenience, and well deſerving the animadverſion of the grand jury. The want of a gaol (for the preſent gaol is almoſt worſe than none) renders the execution of criminal law a nuiſance to the county.

* *The counties weſt of the mountains may now vie with any, in decent and commodious public buildings.*

No. IX.

Progreſs of governments and puniſhments:—State of puniſhments in Pennſylvania.

September Seſſions. 1793.

THE political inſtitutions of the Jews were derived from immediate inſpiration from heaven. But that ſacred ſource of inſtruction is not now open; and ſo diſcordant to ours were the circumſtances of the Jews, that their government is no model for our imitation. Like all other works of heaven, it is adapted to them only, for whom it was deſigned. But the whole world is the empire of the Almighty; and he governs it by great general laws. Theſe rules and diſpenſations of providence are fit objects of humble human imitation; and, in this ſenſe, it may be ſaid, that kings and rulers are the vicegerents of God. In the conſtitution and courſe of providence, it may be remarked, ſuch is the wiſe accommodation of means and ends, that ſuffering is the natural or neceſſary attendant of guilt; and puniſhment ſeems rather to reſult, as a conſequence,

from the conduct of the offender, than from any actual or immediate interposition of over-ruling authority. Human governors have no such controul over the events of the world, and the feelings of men. But this they may do. They may establish their punishments on proper principles, and direct them to proper ends. *Sept. Sess.* 1793.

All our knowledge is progressive from small beginnings. Governments in their origin, like the understanding of an infant, are imperfect and erroneous; the mere impulse of the moment, without any comprehensive view or general scheme. Averse to labour, and ignorant of the arts of life, men want those possessions and enjoyments, which incline the mind to peace, and attach it to home. They seek, by hasty violence, what they will not acquire, by patient industry: and their life is a scene of wandering, rapine, and war. In such a state, their mutual danger must unite the force of all, for the safety of all: and, like the several limbs of the body, all the members of the state must be put under the control of one will. Their leader in war becomes their ruler in peace; and the name of *general* is lost in that of *king*. Such, we may suppose, was the origin of royalty.

In this state of society, men accustomed to ferocity, and strangers to feeling and reflection, can be controled only by violence and severity: and the king, accustomed to the exercise of peremptory, and unconditional authority, punishes disobedience as a personal injury or insult. Hence punishments are instituted and inflicted with a view only to gratify the passions of the despot, and rouse and alarm the coarse feelings of the slave.

But industry and arts, in proportion as they multiply the possessions and enjoyments of men, soften their manners, and incline them to peace. With peace and sober industry, their numbers increase. In proportion to their numbers, is the variety of their pursuits; and, by study and experience, their knowledge is extended. A just view of their own interest restrains them from mutual injury, lessens their sense of danger, and establishes a new source of union, concord, and government. As their state becomes peaceful, commercial, and scientific, a warlike leader becomes useless, and controling authority, in any one man, over these new and various interests,

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becomes invidious and unſafe. Minds enlarged by ſpeculation and experiment call for their natural influence over their own and the combined concerns of the ſtate; and, conſcious of their ſkill and authority, reject the power of one man, to control them. Such, it is natural to believe, is the origin of republics.

In ſuch a ſtate of ſociety, a greater degree of ſenſibility and reflection will diminiſh the ſeverity of puniſhments, or, in other words, puniſhments leſs ſevere will operate more ſtrongly on the mind, to reſtrain it from offence; the authority of government being divided among many, a vindictive ſenſe of perſonal injury cannot mingle in the puniſhment or aggravate the weight of juſtice; and each man being, as it were, part of the ſovereign, the ſufferings of an individual will become an object of greater importance.

This natural progreſs of reaſon and the courſe of things, in the adminiſtration of juſtice and of government in general, is frequently, and has been generally, obſtructed and perverted. A form of government has been eſtabliſhed by accident; from a love of imitation, or an averſion to enquiry, this form is copied by others, as the beſt; antiquity ſtamps it with veneration; habit, for ſuch is the nature of the human mind, renders it agreeable; and thoſe who live under it, at laſt, believe, that it is the only form of government ſuitable to their circumſtances. Thus the free, the varying, and accommodating nature of man is bound in fetters of prejudice, and ſlumbering hugs its chains; and it is not till ſome vaſt commotion, like the revolution in France, has roufed it from its ſleep of ages, that it ſtarts from its dream, and looks back with diſdain at the ſtate from which it has eſcaped.

The ſtates of America had a peculiar origin. In their infancy, they were men. But unhappily, with the knowledge, they had the prejudices of age. The firſt emigrants came into America, with the habit of opinion, that the only proper ſyſtem of government was that which they had experienced in Europe. And if, here and there, exiſted among them a William Penn, his great and original mind was controled by the prejudices of his aſſociates, or the authority of the mother country. When the revolution had diſſolved the political bands

which connected the colonies with Britain, and given them a ſeparate and equal ſtation among the powers of the earth; reaſon, as might have been expected, ſat down, without reſtraint, to ſurvey the circumſtances of this riſing country, and frame a government adapted to its ſituation. Man, no longer marked by a fictitious ſcale of degrees, aſſumed his juſt rank of political equality. Talents, cultivation, and induſtry, combining with the varying chances of life, ſhaped the different ſtations of each; and eſtabliſhed, among all, that gradation of dignity and influence, which reſults from the operation of faculties and events, and was believed to be more happily ſupported, by this natural nobility, than by artificial ranks, founded on poſitive rules, prejudice, and falſe opinion. A rational ſyſtem of government was a ſpectacle to the world. The bigots to eſtabliſhed forms viewed it as viſionary and unſolid; while the friends of reaſon and philoſophy watched it, as the cradle of their hopes. *Sept. Seſſ.* 1793.

From ſuch a government it was to be expected, that a ſyſtem of criminal law ſhould be conſtructed with a mildneſs adapted to the ſtate of the ſociety and government, the gentleneſs of manners, the equality of fortune, the facility of ſubſiſtence, and the juſt importance of the citizens; and that puniſhments would be eſtabliſhed on proper principles, and directed to proper ends. From Pennſylvania, eſpecially, this was to be expected, where all thoſe circumſtances leading to it, happily prevailed. But man, rational as he is, ſeems governed by habit; and it is only by gradual experiments, that reformation is effected. A few only, in every age, dare to think it poſſible, that any other than the preſent arrangement of things can be productive of good. They ſuggeſt the experiment; it is tried with caution; and the world wonders, that it ſucceeds. The poſſibility that America could ſubſiſt, in a ſtate of independence of Britain, was not more doubted, than that hard labour could, almoſt in any caſe, be uſefully ſubſtituted inſtead of death.—And it muſt be confeſſed, that the firſt eſſays of the reformation of the penal law, like many other experiments, hardly correſponded with the ſanguine views of the projectors. Not diſcouraged by a diſappointment in this trial of their ſcheme, and ſtrongly prompted by the juſt-

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neſs of their hopes, and a conviction that principles, eſſentially connected with reaſon and humanity, muſt be practicable and beneficial; the authors of this benevolent plan thought not of abandoning their ſyſtem, but correcting its errors. Theſe lay in expoſing the criminals to the contumely and contagion of public view, and to means and opportunities of eſcape. To their former meaſures, they united ſolitude and ſecure confinement; and on theſe principles, keeping it conſtantly in their view, that the true end of puniſhment is the prevention of crimes, by the reformation of the criminal, making his puniſhment, at the ſame time, an example, and a mean of improvement, they eſtabliſhed, under the management of faithful guardians, a ſyſtem of puniſhment, which the friends of humanity had exhibited, in theory, as rational and perfect; and, while they deſired, hardly cheriſhed a hope, to attain.

Fortunately for the honour of Pennſylvania, the promoters of theſe principles and experiments poſſeſſed a faith in their reality, and enthuſiaſm for their eſtabliſhment, which ſupported them againſt the doubts of the timid, the prejudices of the obſtinate, the ſcoffs of the inſolent, and the arguments of the half-wiſe. They felt, that their object was truth; and knew, that it muſt prevail. And fortunately for the honour of Pennſylvania, this ſtate had a legiſlature, which ſeconded the views of the projectors, kept pace with their hopes, and gave the force of laws to their arrangements.

On the 15th day of September 1786, an act of aſſembly changed the puniſhment of death, for various crimes, and the puniſhment of whipping,* into ſervitude of hard labour, for terms varying according to the enormity of the offence; under certain regulations, as to dreſs, diet, and employment. On the 27th of March, 1789, the errors, which I have ſtated in this plan, having been diſcovered by experience, were corrected by a ſupplementary law, which directed, that the convicts ſhould be confined to labour within the gaol walls; and inſtituted a variety of regulations, to prevent all improper intercourſe, either among the priſoners themſelves, or with others; to preſerve cleanlineſs, ſobriety, health,

* *See alſo* 3 *St. L.* 120.

induſtry, and decorum; to prevent eſcapes, or even deſire to eſcape; and generally to improve the ſyſtem. After the cloſe confinement, the moſt important regulation introduced by this law, and without which the whole would have been ineffectual, was the appointment of ſix inſpectors annually, by the mayor's court of Philadelphia, to ſuperintend the execution of the new ſyſtem in that city. This regulation, giving the friends of the inſtitution the care of its ſucceſs, furniſhed an opportunity of making a fair experiment of its uſefulneſs, and provided guardians for an unfortunate and helpleſs claſs of men. Both theſe laws were repealed, ſupplied, and improved, by an act paſſed 5th of April, 1790;* which, adopting the general principles of the former laws, changed all corporal puniſhment into ſervitude of hard labour, and laid down a more particular ſcheme of directions for the cuſtody, management, and employment of the convicts, and vagrants in the gaol of Philadelphia. It directed, that a keeper of that gaol ſhould be annually appointed, by the mayor and two aldermen of that city, and two juſtices of the peace of that county, with a fixed ſalary for himſelf and his aſſiſtants, as a full compenſation for his ſervices, and in lieu of all fees. And the ſuperintendance of the whole was committed to twelve inſpectors, annually appointed, by the mayor, aldermen, and juſtices aforeſaid; and having authority, with the approbation of the mayor and recorder, to make further regulations for the execution of this law. Due ſeparation was eſtabliſhed between the priſoners; and the workhouſe (the ſuperintendance of which, with the care of furniſhing poor debtors there with food, fuel, and blankets, was afterwards committed to the ſame inſpectors†) was converted into a ſeparate priſon for debtors, and witneſſes in criminal proſecutions. *Sept. Seſſ.* 1793.

When I was in Philadelphia, laſt July, the judges of the high court of errors and appeals were requeſted by the governor, to viſit with him and the inſpectors, the gaol of that city. All who had ever ſeen that gaol, before the late improvements, or who had ever ſeen any

* 2 *State Law* 801. † 3 *St. L.* 237.

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other gaol in the ſtate, muſt have received peculiar ſatisfaction from the general ſurvey of that gaol. We were ſtruck with the general cleanlineſs, decency, ſobriety, induſtry, and ſilence interrupted only by the ſound of labour. The whole appeared like a well ordered family or manufactory. All were buſy. Thoſe who had never known induſtry were taught it there. The women were employed in ſpinning, knitting, ſewing, waſhing, &c. The men were employed in carpenter-work, taylor-work, weaving, making ſhoes, ſhaving log-wood, picking oakum, ſawing ſtones, &c. Some of either ſex, were cooking for their ſeveral meſſes.—All neceſſary ſtock, materials, and tools, were furniſhed them by the keepers and inſpectors. A book of accounts was kept by a clerk, or keeper's aſſiſtant, in which each priſoner was charged with the price of the materials, tools, food, cloathing, &c. furniſhed him; and had credit for the value of his work. And we were told, that moſt of the priſoners had a balance on the books in their favour; and that this balance, whatever it was, at their departure from gaol, would be given to each, with a certificate of his demeanor while confined. If any diſcover exemplary diligence and propriety of behaviour, and manifeſt ſigns of ſincere reformation, he is recommended by the inſpectors to the governor, for a pardon; and their recommendation never fails of ſucceſs: nor does the ſubſequent conduct of the perſon pardoned, give them reaſon to repent of their recommendation. The only intermiſſion from labour, except in the neceſſary hours of refreſhment, is on Sunday; which, agreeably to the inſtitutions of religion, and the dictates of reaſon and morality, is to the priſoners a day of reſt, and is improved to the ſacred purpoſes of its inſtitution. An apartment is fitted up, as a ſmall chapel or place of worſhip, in the gaol, where all the priſoners attend divine ſervice, which is regularly performed by ſome of the miniſters of the city. Such are the happy effects of this improved ſyſtem, that, not only are there no eſcapes, but there are hardly any attempts to eſcape; ſcarcely is one, who has been under this diſcipline, found to return; and the number of criminals has been greatly diminiſhed.

One melancholy exception to this general ſcheme of

improvement we could not avoid obſerving. A large apartment, for each ſex, was crouded with ſervants and ſlaves, committed by their maſters; ſailors, by their captains; ſoldiers, by their officers; and perſons convicted of treſpaſſes and miſdemeanors, committed in execution of their ſentences. Theſe the inſpectors have no authority to compel to work, or to reduce under the general ſyſtem of management. The conſequence is, that they are dirty, idle, and naked. I felt a ſatisfaction in being informed, that the inſpectors had ſeriouſly conſidered this ſubject, and would call to it the attention of the legiſlature, by a ſpeedy application for an act of aſſembly, to regulate commitments of this kind, and the management of perſons ſo committed; and, in general, to bring every priſoner in the gaol under the regulations of the new penal ſyſtem; which they have experienced to be productive of ſuch happy effects. *Sept. Seſſ.* 1793

The conduct of the inſpectors has ſo well juſtified the confidence which has already been placed in them; and this object, which they intend to ſubmit to the legiſlature, ſo well deſerves attention; that I entertain the ſtrongeſt hopes, that the improvements to be ſuggeſted by the inſpectors will receive the ſanction of law, and this principal blemiſh of our reformed plan will be corrected.

The priſon for debtors has not that air of cleanlineſs, and is altogether deſtitute of that induſtry, which is the principal ornament of the gaol. This appears another blemiſh in our ſyſtem of confinement. Induſtry is neceſſary to health, and honourable in every man; and idleneſs, to a man in gaol, with the means of labour in his power; is peculiarly diſgraceful. The patrons of the preſent ſyſtem of puniſhments have, for ſome time alſo had it in view, to aboliſh immediate impriſonment for debt. But, leaſt an abſolute abolition ſhould encourage fraudulent concealment of property, their intention is that ſuch concealment be declared an offence, to be proſecuted criminally, and puniſhed by hard labour, under the new regulations.

Such is the preſent management, with the intended improvements in the gaol of Philadelphia. With reſpect to the other counties, allowing to them a liberty

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of ſending to the Philadelphia gaol all felons ſentenced to a ſervitude of twelve months, or upwards, the law has provided, that malefactors ſentenced to hard labor, in any other county than Philadelphia, ſhall be employed in the ſeveral gaols, and work-houſes, in ſuch hard and ſervile labour; and fed and cloathed in the manner, preſcribed for the Philadelphia gaol. And, for this purpoſe, the ſheriff, with the approbation of the court, is directed to appoint the neceſſary keepers, whoſe wages ſhall be aſcertained by the court, and whoſe duty it ſhall be, to ſuperintend and direct the labour, cloathing, diet, and lodging of the priſoners, and take care, that they be compelled to labour, and orderly demeanor. The cloathing, food, and materials for labour and manufacture muſt be provided by the commiſſioners, to whom the keepers ſhall account, for the work done by the malefactors.* The courts are alſo required to make allowance to poor impriſoned debtors, for fuel, blankets, and food.† All expences and charges incurred by theſe regulations (except for food to the debtors) are to be paid out of the county ſtock.

When this law was enacted, it was doubted, however deſirable, whether it was practicable, to introduce, in the other counties, all the regulations of the gaol in Philadelphia. Indeed the introduction of thoſe regulations, there, was, at firſt, conſidered rather as an experiment; but the ſucceſs has ſo well juſtified the moſt ſanguine hopes of its authors, as to operate as a powerful encouragement to the legiſlature, to extend them whenever the ſtate of population and manufacture can poſſibly ſupport them. The want of inſpectors, which is the principal diſtinction between the regulations of other gaols and thoſe of the Philadelphia gaol, is, in my opinion, the moſt eaſily ſupplied. I truſt, there are, in the ſeveral counties, men not inferior to thoſe in Philadelphia, in integrity and public ſpirit, who would cheerfully engage in ſo good a cauſe. And, in my apprehenſion, whatever regulations may be made, for the management of gaols, there is little proſpect of good from them, while gaolers act without any immediate control, or watchful overſight. The performance of his duty, in the ſafe

* 2 *St. L.* 811, 3 † 3 *St. L.* 237.

cuſtody of his priſoners, will enable a gaoler to conceal the neglect or abuſe of his authority, from the examination of witneſſes. If improper indulgence is allowed to priſoners, they are leagued with the gaoler, to prevent a diſcovery. If improper ſeverity is exerciſed towards them, the priſoners, if they even have the means of communication, may be deterred from a diſcovery, by doubt of want of credit, and apprehenſions of rigorous treatment; or be ſeduced, by a proſpect of improper indulgence. And there ought to be, in every county, ſome confidential perſons, with the authority of inſpectors, to viſit the gaol, when they think fit; with whom the priſoners may have frequent intercourſe, and to whom, as their patrons, they may communicate their grievances. Till this proviſion is made; and the office of gaoler, by a competent ſalary, is rendered reſpectable, and an object of attachment; little good is to be expected from puniſhments in country gaols: for without ſuch proviſion country gaols will continue to be, as, it is to be feared, they now too generally are, places, not of induſtry and reformation, but of idleneſs and corruption. *Sept. Seſſ. 1793.*

Note—*Since the preceding charge was delivered, an act of aſſembly paſſed, 22d April, 1794,* ſubſtituted puniſhment by hard labour, inſtead of death, in all caſes, except murder in the firſt degree. And in all ſuch caſes directed the convicts in every county to be removed to the gaol of Philadelphia.*

* 3 St. I. 599

No. X.

Laws and Sanctions of God, the State, and the Society. The Duty of enforcing each of theſe laws, by the ſanctions of Society, Honour and Shame.

SOCIETY, of courſe, ſuppoſes various relations, with reſpect to which, man's conduct may be conſidered as right or wrong. Various laws neceſſarily ariſe out of thoſe relations, for the direction of our conduct in each. The relation of all his creatures to the *December Seſſions, 1793.*

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Maker of the world is a venerable ſource of ſubmiſſion and reverence. The laws which regulate our conduct, in this relation, are preſcribed to us in the doctrines of revelation, and in thoſe dictates of ſound reaſon, which ariſe from a ſerious, accurate, and extenſive contemplation of the nature and courſe of things, the quality and conſequence of our actions, and the genuine feelings of our minds. Thus the Gentiles, who have no law, are a law to themſelves, and ſhew the works of the law written on their hearts.* Next to the Sovereign of the univerſe, our reſpect and obedience is due to the ſovereignty of the nation, in which we live. Its laws are derived either from antient cuſtoms, which have prevailed, by general conſent, or from expreſs written laws, eſtabliſhed by public authority. There is yet a narrower circle of duty, and, though an inferior, a ſtrong obligation, independent of all power, and of all government, but binding on all ſocial beings, and carefully to be cultivated by every man. All animals ſeem ſenſible of a duty to aid their own ſpecies againſt the attacks and injuries of any other ſpecies. Man, endued with reaſon, memory, and foreſight, enlightened with the accumulated experience of ages, and placed as lord of the inferior world, with that duty to all, which his ſtation ſuggeſts and requires, owes a diſpoſition of benevolence to all his fellow men, and actual exertions of uſefulneſs to all within the impreſſion of his character and actions. Theſe ſentiments and exertions are preſcribed by the circumſtances in which we are placed, and the nature, and manners of the ſociety in which we live; and, in their meaſure, are regulated by the cloſeneſs of connection, and neceſſity of dependence, between us and thoſe who muſt be affected by our feelings and conduct.—Man's influence is limited; and, like a little water ſprinkled over a large ſurface, it becomes uſeleſs, when too widely diffuſed: to be uſeful, it muſt be reſtrained in its operations and objects. A more warm and ſteady benevolence and active duty is required of us, to thoſe of our own nation, than to the reſt of the world: for they have none other ſo cloſely allied; none, on whom they are ſo immediately dependent; none, whoſe ſervices

* *Rom. ii.* 14, 15.

can ſo eaſily reach them. On the ſame principles, our benevolence, with reſpect to thoſe of our own nation, ought to be more warm, ſteady, and active, towards our own friends and family, than towards others. There we can be moſt uſeful, there our ſervices are moſt required, and there, if our ſervices are not, no ſervices will be beſtowed. *Dec. Eſſ.* 1793.

Our actions, as they come within theſe ſeveral laws, and are compared with them, receive different names. With reſpect to the law of God, they are *ſins*, or *duties*. —With reſpect to the law of the ſtate, they are *offences*, or innocent. And with reſpect to the law of ſociety, they are *vices*, or *virtues*, or, in a lower grade, follies, or propriety of conduct. Some actions violate all theſe laws, as murder; others are ſometimes conſidered as violating rather the law of the ſtate, as ſmuggling; and others only the law of ſociety, as ingratitude. All the laws of God, and of the ſtate, ought to be conſidered as laws of the ſociety; and every ſin, and every offence ought to be holden as a vice: for it is impoſſible, that the Almighty ſhould ever require a duty uſeleſs or unneceſſary to our happineſs; and it is not to be preſumed, that the ſtate would declare that to be an offence, which is not inconſiſtent with our peace and proſperity. Every feeling or act of duty, towards God and the ſtate, muſt be, or be preſumed, a feeling or act of duty, towards our fellow men.

Each of theſe laws has its reſpective ſanctions, or rewards and puniſhments, annexed to it. Thoſe of the law of God are future and inviſible. They would therefore make little impreſſion on men, if theſe qualities were not balanced by their duration and degree: if they are future and inviſible, they are eternal and immenſe. Many of the laws of God have been adopted as laws of the ſtate; and have received, in addition to the unſeen ſanctions of another world, the viſible ſanctions of this. Human governments ſeem to conſider fear as the proper motive of obedience: for hardly in any inſtance, have they eſtabliſhed any ſanction of reward; but enforce their laws, by puniſhments only.—Though ſociety, abſtracted from government, having no power over the bodies of men, and no exiſtence, as ſuch in the next life, wants thoſe ſenſible or violent

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puniſhments, which the laws of God and of the ſtate are capable of inflicting; its laws are not, therefore, without ſanctions; for they poſſeſs thoſe of public opinion, honour and ſhame; ſanctions of ſuch vaſt influence, that they bear up againſt the terror of both human and divine puniſhments.

With reſpect to ſins againſt the law of God, the ſanctions are peculiarly in his own hand; to whom vengeance belongeth, and who will repay it. With reſpect to offences againſt the law of the ſtate, the ſanctions are in the hands of the public officers appointed for that purpoſe. The duty of individuals requires, that they leave the ſword of juſtice in the hands of the magiſtrate, and uſurp not the public force. As ſins againſt God, conſidered merely as ſuch, are to be puniſhed by God only, offences againſt the ſtate, conſidered as ſuch, are to be puniſhed by the ſtate only, that is, by the officers appointed for that purpoſe, by public authority. As thoſe perſecutions, which, in the times of ignorance and ſuperſtition, under a pretence of the honour of God, were carried on againſt errors in religious opinions, became no leſs blaſphemous to God, than diſgraceful to religion, reaſon, and humanity; ſo acts of private unauthoriſed force, to ſuppreſs or puniſh offences againſt the ſtate, are dangerous to civil government and the peace of ſociety, and diſgraceful to the citizens concerned. But as the ſtate, or its officers, cannot, like the Almighty, diſcern all the ſecret or open actions of men, much leſs their thoughts or intentions, it becomes the duty of every citizen to ſerve as eyes to the ſtate, to watch over the actions of their fellow citizens, give information of all offences to the proper officer, and ſecure offenders for the puniſhment of the law. For though, in the execution of public juſtice, the duty of a magiſtrate or officer is truſted but to ſome; the duty of a witneſs, and the duty of aiding public authority, is impoſed upon all: and the citizen, who conceals offences againſt the ſtate from the knowledge of thoſe, to whom proſecution or puniſhment belongs; or who aſſiſts an offender to eſcape, or neglects proper meaſures, to render him amenable to juſtice, ſaps the foundation of public authority, and contributes to diſorder, and diſobedience to the laws.

This duty of a citizen was prudently and effectually secured, by the antient Saxon police, inſtituted by Alfred, when, in dividing and ſubdividing the kingdom of England, he ordered every man (on pain of being impriſoned, as an offender or a ſuſpected perſon, till he found pledges for his good behaviour) to inrol himſelf into ſome one of the inferior diviſions, decennaries, or tithings; and made all the inhabitants of each decennary mutual ſureties for the good behaviour of each*. Thus, by combining public and private intereſt, he promoted obedience to the laws, and ſecured the teſtimony and force of every man, in aid of public authority. Like meaſures have been adopted in later times, by ſtatutes, which have made the hundred anſwerable for robberies and riots committed within it†. *Dec. Seſſ.* 1793.

In this manner are the laws of God and of the ſtate protected or avenged. As to the laws of ſociety, thoſe mutual obligations, which, without reſpect to government, riſe out of our ſituation as men aſſociated together, and preſcribe the virtues in that ſituation; though every ſuch virtue muſt alſo be a duty towards God, the author and ruler of the univerſe, and every vice, contrary to theſe laws of ſociety, muſt be a ſin againſt the laws of God; and though virtue is highly beneficial, and vice highly pernicious to every ſtate; yet the ſtate has not thought proper, generally, to enforce ſuch virtues, and puniſh ſuch vices, by its ſanctions; but leaves ſociety to avenge its own cauſe. Want of generoſity, charity, candour, and many other virtues, and their oppoſite vices, are puniſhable by no law of the ſtate. But fortunately for ſociety, it poſſeſſes ſanctions, of which it has the uncontrouled diſpoſal, fully ſufficient, were they faithfully applied, to enforce all its obligations, and make vice hide its head. The important ſanction of public opinion, honour and ſhame, is left in the hands of the individuals in ſociety, to be diſtributed according to the merit or demerit of their fellow men.—The ſtate enquires not how they exerciſe their opinion,

* 1 *Comm.* 114. 1 *Reeve's Eng. Law.* 13.

† *Stat. Wint.* 1 *Geo. I. c.* 5 *iv Comm.* 246. *Perhaps the inſurrection in this ſtate, in* 1794, *indicates a neceſſity of ſome ſuch proviſion here.*

Dec. Seff. 1793.

the free exercise of which is their indispensible right, nor punishes for the honest and well founded sentiments or signs of esteem or contempt. Public opinion, good or evil, remains the property of the people individually as members of society; and not to the tribunal of government, but to the tribunal of God, of their own consciences, and to this tribunal of public opinion are they answerable, for the exercise of this right. But to the tribunal of God, their own consciences, and to this tribunal of public opinion, every man is *strictly* answerable, for the *faithful* exercise of this right; and a judge, or officer of justice, is not more sacredly bound to impartiality and justice, in distributing the sanctions of the state, to those who obey or break its laws; than every individual is bound to impartiality and justice, in distributing the sanctions of public opinion, honor and shame, to those who obey or break the laws of society, fulfill or omit the duties, which they owe to their fellow men. Were this duty of every individual well understood, and faithfully practised, I know nothing so effectual, to improve the sentiments and manners of society, and to enforce those obligations, the neglect of which, though they can be enforced by no law of the state, is very pernicious to the virtue and happiness of its citizens. The sanctions of the laws of God, and of the state, will but imperfectly accomplish their ends; if this, which our maker, and our government, intended and supposes, as supplementary to both, continue to be neglected. Let the Almighty threaten, let the state decree punishment, if public esteem do not attend obedience, short sighted man will listen to the voice of public opinion*. However sinful, however criminal, however vicious; eminence in that, which is most esteemed by the society around us, will be the desire of our hearts, and the pursuit of our lives. If we would, therefore, have the laws of God, and of the state, obeyed, we must make them also the laws of our society, and enforce them by the sanctions of honour and shame. Unfortunately,

* "*Yes, I am proud; I must be proud to see,*
"*Men not afraid of God, afraid of me:*
"*Safe from the Bar, the Pulpit, and the Throne,*
"*Yet touch'd and sham'd by Ridicule alone.*"
POPE'S EPIL. TO SATIRES DIAL. ii. ver 208.

theſe ſanctions are not only neglected, but miſapplied; and when theſe are miſapplied, the ſanctions of God and of the ſtate, threaten and perſuade in vain. Has not public opinion, in ſome places, made it faſhionable, to murder a fellow man, or to debauch the wife or daughter of a neighbour or a friend? *Dec. Seſſ.* 1793.

The free exerciſe, and faithful application, of public opinion, are no leſs eſſential to liberty, than to virtue. In all wiſe, and all free governments, the freedom and impartiality of public opinion will therefore be held ſacred; cultivated, with the utmoſt care; and protected, with the utmoſt ſpirit. It oppoſes a barrier to deſpotiſm and vice, which will curb the moſt oppreſſive and the baſeſt man, whom nothing elſe can reſtrain. Hiſtory and the preſs are organs of public opinion, and are, therefore, the terror of tyrants and villains among men. Hence the zeal of the people of China, for their tribunal of hiſtory;* and of the people of England, for the freedom of the preſs.

As the diſtant and inviſible ſanctions of the law of God make but a feeble impreſſion on thoughtleſs men; as the laws of the ſtate do not enforce the peculiar obligations of ſociety; and as theſe obligations are eſſential to the happineſs of men; it follows, that it muſt be the duty of every individual, to enforce theſe obligations, by their proper ſanctions, honour and ſhame. To the obligations of ſociety *eſpecially*; but not to the obligations of ſociety *only*; theſe ſanctions ought to be applied. Our maker intends, and the ſtate ſuppoſes, that theſe ſanctions ſhall be applied, to enforce the laws of the divine and of human government. Theſe ſanctions were put into our hands as a public truſt, to be exerciſed for theſe purpoſes; and we betray our duty to God, the ſtate, and the ſociety, if we neglect or miſapply them. If, conſcious of its importance, we ſeriouſly and impartially diſcharge this public duty; if we give our countenance, our praiſe, and our eſteem, to the man whoſe character is marked with an habitual reverence for the laws of God, obedience to the laws of the ſtate, and obſervance of the laws of ſociety; if we neglect, condemn, and refuſe to honour, the man, whoſe character is marked with an habitual diſregard of theſe laws; if we deny our

* *Helvetius L'Eſprit Diſc* 3. *c.* 39.

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houſes, our converſation, and our civilities, to the fraudulent, the ungrateful, the ungenerous, the baſe, the profane, the indecent, the diſſolute, the idle, and thoſe who purſue gain by unworthy, improper, or ſelfiſh means, or, in a word, who do not demean themſelves as good members of ſociety; there will be no room for vice in the world, if every arm be thus raiſed againſt it, and all men make a common cauſe, to enforce the laws of God, of the ſtate, and of ſociety.

Leaving, however, the conſideration of thoſe general duties of every man, at all times, let us now turn our attention to the peculiar duties of our ſtation, at this time. You and we are now here, gentlemen, in the capacity of public officers, called, by the conſtitution and laws of our government, to enquire, whether any, within this county, have violated the duty, which they owe to the ſtate. For our preſent authority, as public officers extends only to offences againſt the laws of the ſtate. Such is the nature and extent of our duty. In the diſcharge of this duty, it is *our* part, to point out to you, ſo far as the preſent occaſion may require, what the public laws of the ſtate are; and it is *your* part, to enquire, and report to us, ſo far as you may know or be informed, by the teſtimony to be ſubmitted to your examination, whether the conduct of any, within this county has been contrary to ſuch public laws; in order that, on your preſentment to us, a more particular and full enquiry may be made, the guilt or innocence of the accuſed perſon aſcertained, and the public juſtice of the ſtate vindicated.

No. XI.

Virtue, the end of Government, is beſt ſecured by a Democratic form of Government.—Principles reſulting from a Democracy.

March Seſſions, 1794.

VIRTUE, in an enlarged ſenſe, is a diſpoſition and conduct uſeful to mankind. But, in a ſenſe in which it can be practicably exerted, it is a diſpoſition and conduct uſeful to the nation or community, in which we live, to all within our reach, and eſpecially to thoſe

with whom we are moſt cloſely connected. It ſeems impoſſible, that there ſhould be any rational definition of virtue eſſentially different from this, that it conſiſts in uſeful actions, proceeding from honeſt principles.—Actions hurtful to our fellow men muſt be vicious: and actions uſeleſs to them cannot deſerve the name of virtue. *March Seſſ.* 1794.

As the ſituation of men, in different ages or countries, is eſſentially different; actions, which, abſtractly conſidered, are very different, in their nature, muſt, in different ſtates of ſociety, receive the ſame name. And the action, which, in one country, is indulged, becauſe accommodated to the ſtate of ſociety there, in another, is prohibited, becauſe repugnant to the ſtate of ſociety there. Nothing can be more different, than the views, in which different ages and countries have conſidered the ſame fact: and actions, not only lawful, but honourable, in one place or time, are criminal in another.—Suicide and idolatry were neither diſgraceful nor criminal, in antient Greece and Rome. In modern Turkey, it is unlawful to taſte wine; but a man may, at the ſame time, marry ſeveral wives, and keep ſeveral concubines. Such is the degree of population in China, that (would an European believe it?) the law permits parents to expoſe their infants to periſh. In all theſe caſes, however, it is the mode only, and not the nature of virtue that is changed. A change of dreſs or complexion alters not the man. In all its various ſhapes, the nature of virtue is immutable, and its conſtant object, by whatever actions it endeavours to effect it, is public utility.

To produce virtue, or public utility, is the true end of government. Virtue is moſt effectually produced, by making it the intereſt of each individual, to promote the public good. That form of government muſt be good, which neceſſarily combines the individual, with the general, intereſt; and that form of government muſt be bad, which neceſſarily diſjoins them. That therefore muſt be the beſt form of government, which moſt effectually and inſeparably combines and unites the general and individual intereſt: and this is moſt effectually done, in a democratic republic.

March Seſſ. 1794. In a monarchy, where a ſingle perſon has the diſpoſal of all power, authority, and benefits, the intereſt of every individual leads him to accommodate his manners and conduct to the will and intereſt of the monarch only; for, from him only, can he have hopes or fears. All tempers and actions will be wholly ſubmitted to his pleaſure. Habitual ſervility and baſeneſs, mutual diſtruſt and treachery, indolence and ignorance, will form the national character: and the deſcription of it will be ſimple and ſhort; one tyrant, and many ſlaves. The intereſt of himſelf, and the intereſt of the monarch will be the only objects purſued, by each individual. A diſpoſition to public utility, a purſuit of public good, in other words, the love and practice of virtue, may become unnatural, becauſe uſeleſs and dangerous: uſeleſs, becauſe it will procure no advantage to the individual, whoſe ſtate, fortune, and happineſs, depend ſolely on the monarch: dangerous, becauſe odious to this monarch, from whoſe power (which conſiſts in others having none) it is derogatory. The duty, therefore, which his own intereſt and preſervation requires, from a ſubject of this government, is ſubmiſſion to the will of the monarch, a conſtant purſuit of his ſingle intereſt, and a careful avoidance of every thing, which, promoting the public utility, muſt abridge the power of the monarch. It is thus rendered impoſſible for a ſlave to be virtuous: and the unfortunate man, who ſhould make the attempt, would ſoon find his endeavours cruſhed, by the power of the monarch, and the depravity of his fellow ſlaves.

In like manner, in an ariſtocracy, where all power is veſted in a few; the intereſt of each of their ſubjects, is, to promote the intereſt of the rulers, from whom only the ſubjects have any hopes or fears. In this form of government, alſo, to promote the general intereſt is, to oppoſe and leſſen the power of thoſe, on whom the ſtate, fortune, and happineſs of each individual depend. The picture and character of the nation is here nearly the ſame. You ſee here a few tyrants, and many ſlaves. There is no inducement and every danger, to virtue.—To be ſafe, you muſt be vicious, or have no character at all. And the only proſpect of relief, to the miſerable people, is, that the mutual envy, enmity, or fear of the tyrants, may lead ſome of them, for their own ſupport,

to raiſe the people to a capacity, to vindicate their general rights, and annihilate the power of their maſters. *March Seſſ.* 1794.

In theſe forms of government, the ſovereign and the people, the power, and thoſe, for whoſe benefit the power is eſtabliſhed, are different and adverſe. The ſacred rule, that the ſafety of the people is the ſupreme law, is perverted into a maxim, as noxious to virtue, as it is firmly eſtabliſhed, and inceſſantly purſued, that the ſafety of the rulers is the ſupreme law. In proportion, therefore, as the rulers are few, the inducement to virtue is diminiſhed. To multiply motives to virtue, you muſt multiply thoſe, in whoſe hands power is lodged, and, in conſequence, on whom the ſtate, fortune, and happineſs of each individual depend. And when you have made the power and the people, the rulers and the ruled, one; you have taken the beſt meaſures, to promote virtue, that is, to promote public utility.

The beſt form of government, therefore, or the government moſt favourable to virtue, is a democratic republic. Here all power being veſted in the whole people; the whole people become the ſource of the hopes, proſperity, and happineſs of every individual; and, therefore, the intereſt of every individual leads him, to promote the intereſt of the whole people. The general and individual intereſt is thus effectually and inſeparably combined and united. To be generally uſeful, is the way to general favour; general favour is the way to general power; and general power is a mean of enjoyment, and therefore, an object of deſire, and a motive of action to every individual. Thus every individual is compelled to be virtuous, that is, to be uſeful.

The whole nation, under this form of government, preſents a picture and character very different from thoſe already ſtated. The freedom of the government diſplays itſelf in the ſentiments, the manners, and the conduct of every citizen. There being no individual, or junto, to whoſe power and direction the demeanor of all muſt be accommodated, an unreſtrained variety of character is exhibited; a general manly independence prevails; a conſciouſneſs of power gives a dignity to every citizen; and it may be ſaid of the whole nation, as the ambaſſadors of Pyrrhus ſaid of the Roman ſenate, that it appears a nation of kings.

March Seſſ. 1794. Such, in the abſtract, (for this is all matter of ſpeculation) and allowing for the variation of all principles in practice, is the nature of the ſeveral forms of government, and their influence on manners and virtue: In the various combinations of each, according as the worſt or the beſt form is mingled and prevails, the influence is corrupted or improved.

Our government, happily for us, is of the laſt and beſt kind, a democratic republic; but, like all democracies of any conſiderable extent, in a repreſentative form. All power is in the people: but, as it is impoſſible, that the people ſhould exerciſe it perſonally, they exerciſe it by their deputies. Even in the ſmalleſt diſtricts or corporations, it is found impoſſible for the inhabitants, to tranſact perſonally, the common buſineſs; and it becomes neceſſary, to divide it into portions, and intruſt it to the management of certain individuals appointed to each. More neceſſary muſt this be, in extenſive and populous republics. Were all the people to aſſemble, to make laws, it would be impoſſible to collect the general will. This duty, therefore, is intruſted to deputies, choſen in diſtricts not ſmaller than convenience of aſſembling requires.—Both for ſafety and convenience, the power of executing the laws, is, in various forms, intruſted to other deputies, choſen in the ſame manner, or with different modifications, and with authority limited or extenſive, as the nature of their duty, for the public good, ſeems to require.

Still, however, all power is in the people; though, becauſe they cannot exerciſe it perſonally, they have intruſted the exerciſe of it to deputies, appointed from themſelves. All theſe deputies or officers are but the repreſentatives or agents of the people: the mouths, by which the people ſpeak; the hands, by which the people act. The people preſcribe and limit their authority.—The people appoint them.—The people call them to account.—The people remove them. But the people exerciſe theſe powers over their officers, by agents, or according to certain rules, which they have eſtabliſhed for themſelves; and, while theſe rules ſubſiſt, can exerciſe theſe powers in no other way. For to encourage their officers freely to accept, and faithfully to diſcharge the duties of their truſt; the people, for the public good,

veſt their officers with a ſtated tenure in their offices, that they may not be the ſlaves of power, or the ſport of caprice, and ſo incapable of a proper exerciſe of their duty. But the people is the ſource of all power. The people *will*, the people *do*, every thing: though, to expreſs their will, or exert their force, they do not riſe in a body; but ſpeak by the mouth, and act by the hand, of deputies. To elect theſe deputies, the people, at times, riſe in a body; and all ſpeak by their own mouths.—At ſuch times, they are, if I may adopt an expreſſion of a nation labouring in the cauſe of democracy, a "primary" democracy; yet, however, of a federate kind, becauſe all the people cannot aſſemble in one place. On all other occaſions, they are a repreſentative democracy. *March Seſſ.* 1794.

The following principles ſeem to reſult from this form of government.

1. The people, in whom all power is veſted, is the whole people. And, becauſe it cannot be ſuppoſed, that the whole people, ſhould, like a jury, or a Poliſh diet, agree in every meaſure; neceſſity of deciſion requires, that, where the whole do not agree, the will of a majority ſhould be conſidered as the will of the whole: and that the whole ſhould be conſidered as preſent, where the whole ought to be preſent. But any number of individuals, leſs than a majority of the whole nation, has no right to call themſelves *the people*, or demand or expect, in any general meaſure, that their opinions ſhould be received with ſubmiſſion, or have any binding force.

2. On the ſuppoſition that the people ought not to truſt to any deputies, to do that, which conſiſtently with public convenience, and the public good, they can do themſelves; it has been ſaid that the people ought, themſelves, to chooſe all thoſe deputies, whom they empower to make laws. But this, like all other abſtract principles, muſt yield to experience, and be followed only ſo far as it promotes public convenience and the public good. The paſſions of the people are often the greateſt enemies to their intereſts and liberties.

3. Where the people have intruſted deputies or public officers, with the exerciſe of an authority, they ought not to reſtrain, overawe, or influence thoſe deputies in

March Seſſ. 1794. the exerciſe of ſuch authority, to the extent in which they have been intruſted; but leaving them free, in this extent, reſerve the power of public puniſhment, rejection, or contempt for its abuſe.

4. Though the deputies of the people, or public officers, ought always to conſider themſelves, as the *reſponſible* agents of the people; they ought always to conſider themſelves as the *free* agents of the people; free, within the extent of their authority; and reſponſible only for its abuſe. They ought to believe, that the authority veſted in them, by the people, was veſted in them, for the good of the people; or it would not have been veſted in them, by the people: and believing this, they ought to exert it, to the extent in which it is veſted, wherever they believe, that the public good requires, that it ſhould be ſo exerted. They ought to conſider it as a ſacred depoſit in their hands, to be faithfully uſed, for the purpoſes, for which it was beſtowed. And they ought to conſider themſelves equally criminal, and traitors to the conſtitution, if, on any proper occaſion, they neglect to exert their authority, to the extent in which it was delegated, as if they exerted it beyond this extent, or uſurped authority not delegated, or endeavoured to reſtrain the people in the exerciſe of power reſerved to themſelves. The officer betrays his truſt, deſerts his poſt, and commits a crime againſt public liberty, and public virtue; who bends his authority to the fluctuating humours of the people, or the fixed prejudices or opinions of thoſe among whom he lives. And he is not a good officer, whoſe end is to do what is pleaſing: but he only is a good officer, whoſe end is to do what is uſeful, and whoſe means are lawful, convenient, and effectual, for this end. Therefore, the proper temper of an officer, the temper proper for the promotion of public liberty and virtue, is not a temper of compliance, but an intelligent, upright, and manly, purſuit of general good, by lawful authority.

5. When the deputies of the people, public officers, or, as the French name them, the conſtituted authorities, acting within their legal powers, have expreſſed their will, determination, or act; it ought to be conſidered as the will, determination, or act, of the people, not to be contradicted or oppoſed, but by ſome other conſtitutional

authority, ſtronger than it. If it be not contradicted by a conſtitutional authority, ſtronger than it; it muſt be preſumed, that it is the will of the people, that it be not contradicted. What has been legally done, muſt be conſidered as rightly done; and public liberty, virtue, and peace, require, that it be ſubmitted to: for no principle is more dangerous, in a democracy, than this, that any number of individuals, leſs than a majority, ſhould control the whole. The will of the public officer, conſtitutionally expreſſed, muſt, therefore, be conſidered as the will of the nation. And againſt the will of the nation, no individual ought to ſet up his will: and, if, againſt it, no individual ought to ſet up his will, no number of individuals, leſs than a majority, ought to ſet up their will, againſt it: for, if one individual, or any number of individuals, leſs than a majority, may ſet up his or their will, againſt the expreſs or implied will of the nation, then every other individual, or every other number of individuals, leſs than a majority, may ſet up his or their will, againſt the expreſs or implied will of the nation; and, inſtead of peace and liberty, there would be violence and anarchy, the worſt of all political evils: for violence in one is better than violence in all; and any government is better than none. *March Seſſ.* 1794.

Its tendency to anarchy being the principal objection urged againſt a democratic government, it is incumbent on a free people, to evince, in experience, that this objection is ill founded; that anarchy has no neceſſary connection with democracy; that freemen can reſpect the authority, which they conſtitute for themſelves, more perfectly than ſlaves, that which is impoſed upon them; and that the obedience, which ſprings from free will, is more uniform and ſincere, than that which is extorted by force. By doing this, all the ends of government, liberty, and juſtice, are ſecured: and theſe can only be ſecured, by combining power in the people, with efficacy in their officers.

6. Though the people have intruſted their officers with the exerciſe of their power; they ought ſtill to remember, that the government is theirs; and that their honour, intereſt, happineſs, and peace, depend on the due adminiſtration of all its branches. Every individual ought therefore, to conſider, that, though, for his own,

March Seff. 1794. and for the public good, he is reſtrained from oppoſing the officers of the public, in the legal exerciſe of their authority; yet, for his own, and for the public good, he is bound to ſupport and aſſiſt them, in the legal exerciſe of their authority. Every individual ought to conſider, that it is his authority, that public officers are carrying into execution, and that he is bound, in intereſt, honour, and duty, to ſupport and aſſiſt it. Every individual ought to conſider, that public officers cannot do every thing, neceſſary, in the adminiſtration of government, to be done; and that there are many occaſions, on which, the private arm muſt be extended to aid the public, or juſtice and government muſt ceaſe. Every individual ought to conſider, that the purſuit and promotion of virtue is an indiſpenſable duty; that virtue is general good; that general good cannot be promoted, without a faithful execution of public authority; and that public authority cannot be executed, without the aid of individual exertions.

7. If it be, therefore, the duty of every individual citizen, to ſupport and aſſiſt the due execution of the laws; more eſpecially is it the peculiar duty of thoſe, who, like you, gentlemen, are occaſionally called out, in the capacity of public officers, and bound, by oath, to the diſcharge of this public truſt.

No. XII.

Neceſſity of Submiſſion to the Exciſe Law.

September Seſſions. 1794. THE alarming and awful ſituation of this country, at this time, is too well kown to require a ſtatement. On the part of government, we are now offered a forgiveneſs of all that is paſt, on condition, that we ſincerely ſubmit to the exciſe law, and all other laws. The queſtion now is, whether we will ſubmit to the terms propoſed, or not.

The deciſion of this queſtion is of ſuch importance, that I am ſure it will receive a ſolemn conſideration,

from every citizen of a ſober mind. If we accept the terms, we ſhall have *peace*. If we reject them, we ſhall have *war*. There is no *medium* between theſe extremes. For, in the preſent ſtate of this country, it is impoſſible to expect, from government, a repeal of the exciſe law. Government is the *whole* people, acting by their repreſentatives. The will of thoſe repreſentatives muſt not be extorted by force or fear; otherwiſe, thoſe, who thus conſtrain them, exerciſe a tyranny over the reſt of the people. We are little more than a ſeventieth part of the United States. We ought not, therefore, to pretend to dictate laws to the whole. But whatever portion we may be of the people, if one law is repealed, at the call of armed men, government is deſtroyed: no law will have any force: every law will be diſobeyed, in ſome part of the union. Government is, therefore, now compelled to enforce ſubmiſſion to *this* law, or to *none*. The whole force of the United States muſt be exerted, to ſupport its authority now; or the government of the United States muſt ceaſe to exiſt. *Submiſſion*, or *war*, therefore is the alternative. *Sept. Seſſ.* 1794.

War is ſo dreadful a calamity, that nothing can juſtify its admiſſion, but an evil, againſt which no other remedy remains. That the colonies, to relieve themſelves from the tyranny of Britain, ſhould have rouſed to war, no man will wonder. They had to acquire the firſt principles of liberty, an equal voice in framing their laws. The ſame was the caſe of France. Its conſtitution was overthrown; and one man had, by inheritance, acquired a power, which he could tranſmit to his ſucceſſor, of making laws for the whole nation. But our conſtitution has already ſecured the moſt democratic principles of repreſentation. Our complaint is againſt the ordinary exerciſe of legiſlation. *We* have now more than a juſt proportion of repreſentatives.* To fill our juſt proportion, we may chooſe whom we pleaſe. And we ought not yet to deſpair, that, in a legal manner, we ſhall receive redreſs, for every juſt complaint. The principles of liberty are completely eſtabliſhed in our

* *One ſenator and three repreſentatives in Congreſs, from theſe counties.*

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If we determine on *war*, look forward to the conſequences. Either we ſhall *defeat* the United States, or the United States will *ſubdue* us. If the United States ſubdue us; we ſhall, at the end of the war, be, certainly, not in a better ſituation, than we are in at preſent; for the ſame neceſſity, the preſervation of the authority of government, will exiſt, for enforcing the law *then*; which exiſts, for enforcing it *now*. We ſhall be in a worſe ſituation; for government will then be under no obligation to grant us the favourable terms, which are now offered; but may exact puniſhment, for paſt offences; penalties, for paſt delinquencies; compenſation, for paſt damages; and re-imburſement of the expences of the war. To theſe I might add the miſeries attending the war. But as theſe will attend the war, in either event, I ſhall particularly allude to them, in the ſuppoſition of our defeating the United States.

To me, this event appears improbable, in the laſt degree. A train of unfortunate deluſions (for ſuch I deem them) ſeems to occupy the minds of many in this country. It is ſaid, that no militia will come out againſt us; that, if they do, we are ſo much ſuperior in arms, that we ſhall eaſily defeat them; that we can intercept them, in the mountains, and prevent their paſſage; that, if they ſhould come, they will march peaceably along, and not diſturb the citizen engaged in the lawful occupations of life; and that, at the worſt, we can throw ourſelves under the protection of Britain.

On ſuch notions, theſe are my remarks.—From all that I have heard or ſeen, there is a reſentment in the people of the other ſide of the mountains, againſt our conduct, on two grounds; as being contradictory to the principles of democracy, which require obedience to a conſtitutional law; and as refuſing to bear *any* part of a burden, to which they have ſubmitted. This reſentment will not only carry *vast numbers* of them, to comply

with the regular call of the militia, but to ſtep forward, as volunteers. Suppoſing (which may yet be doubted) that they may, at firſt, be inferior to us, in the art of fighting; the intereſts of the United States are ſo deeply involved in our ſubmiſſion, that no expence will be ſpared, to accompliſh it. And, ſhould the draught of the militia be inſufficient, certainly the legiſlature will enable the executive, to raiſe and maintain a ſtanding body of forces, to accompliſh the object of government. They will come, at different times, and in different directions, and accumulated numbers: for the "whole force" of the United States will be directed againſt us: ſo has the preſident, who never ſpeaks, till he has determined, declared, by his proclamation. If this country reject the conditions offered, the whole country will be conſidered as in a ſtate of rebellion: every man muſt be conſidered either as a citizen, or as an enemy. If he ſay, he is a citizen, he may be called upon, by the authority of government, to aſſiſt its force, in ſubduing its enemies. If he refuſe, he becomes an enemy, and may be treated as ſuch. The army of government may live among us at free quarters, and reduce us to obedience, by plunder, fire, and ſword. Will the Britiſh receive us? The government of Canada dare not, without authority from London. And it is not to be ſuppoſed, that Britain will riſk the loſs of the friendſhip and trade of the United States, for ſo poor an object, as our becoming her ſubjects. If ſhe did, might we not expect, that the United States would ſeize her dominions on the eaſtern part of Canada and Nova-Scotia, and intercept our communication with her. Againſt the "whole force" of the United States, exerted as we have reaſon to fear, what have we to reſt on? Where are our arms? Where are our magazines of military ſtores? Or where can we obtain a ſupply of theſe articles, but from the United States, with whom we ſhall be at war? All communication between us, and our fellow citizens on the eaſt ſide of the mountains, will be cut off. Even the ſupplies of the common articles of life, which we receive from them, will be prevented: and not a ſingle article of food or cloathing, much leſs of arms or ammunition, will be furniſhed to us, from that quarter. Army after

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army, will be ſent againſt us. In a ſtate of open war, we ſhall be conſidered as any other enemy, with the additional rancour attached to a civil war. Our agriculture will be deſtroyed; our fields laid waſte; our houſes burnt; and, while we are fighting our fellow citizens, on one ſide, the Indians (and God knows how ſoon) will attack us on the other. The conſciences of many, among ourſelves, will ſhrink back with horror, at the idea of drawing a ſword againſt our brethren! They will call for neutrality. They will enter into aſſociations for mutual defence. Many, who, now, from fear of danger or inſult, put on the appearance of zeal and violence, will, when it comes to deciſive exertion, draw back. But thoſe, who are for war, will ſtrive, by force, to draw in thoſe, who are for peace. We ſhall attack and deſtroy each other; and fall by our own hands. Our corn-fields will be converted into fields of battle. No man will ſow, for no man will be ſure, that he ſhall reap. Poverty, diſtreſs, and famine, will extinguiſh us. All mutual confidence will be at an end, and all the bands of ſociety will be diſſolved. Every man will be afraid to ſpeak to his neighbour. There will be no power of government, to control the violence of the wicked. No man's life, no man's houſe, no man's goods, no man's wife, no man's daughter will be ſafe. A ſcene of general deſtruction will take place. And ſhould government, weary of chaſtiſing us, at laſt leave us to ourſelves; we ſhall be a miſerable remnant, without wealth, commerce, or virtue; a prey to the ſavages, or ſlaves to Britain.

Are we prepared for a ſeparation from the United States, and to exiſt as an independent people? This is a queſtion, which ought to be ſettled previouſly to our taking up arms againſt government. For, to diſobey government, while, by remaining in it, we admit its authority to command, is too abſurd, and too contrary to the duty of citizens, for any man of reaſon and virtue to maintain; eſpecially where that government, like ours, is created and changeable by the people themſelves, that is, by the *whole* people, or a majority of the *whole* people. Our appeal to arms is, therefore, a declaration of independence, and muſt iſſue either in ſeparation or ſubmiſſion. Government cannot recede farther than it has done. It has already made ſacrifices, which intitle

it to grateful returns. It offers to forgive paſt offences, and conſider us as having never erred. It cannot, without a total extinction of all authority, repeal this law, while we reſiſt it. Government muſt either ſubdue us, or caſt us off. For, however we may flatter ourſelves with the deſtructive hope of *defeating* government, we can have no proſpect of *ſubduing* it, and compelling the United States to retain us in the Union. Suppoſe us, then, a ſeparate people, what proſpect have we of being able to ſecure thoſe objects, which are eſſential to the proſperity of this country, and of far more conſequence, than the repeal of the exciſe law? Shall we, at our own expence, ſubdue the Indians, ſeize the Weſtern poſts, and open the Miſſiſſippi? Or will not the Britiſh, countenanced by the United States, retain the poſts, and arm and protect the Indians againſt us? And will not the Spaniards, under the ſame countenance, block up the Miſſiſſippi, and refuſe, perhaps, all trade with us? At preſent, there is a fair proſpect of an accommodation with Britain, and, by the influence of the United States, we have reaſon to hope for a ſurrender of the Weſtern poſts, and, of conſequence, a peace with the Indians: There is alſo a negotiation, induſtrioufly, and not unpromiſingly, conducted, with Spain, for the free navigation of the Miſſiſſippi. The continuance of our union with the United States may, therefore, in a ſhort time, ſecure us all our favourite objects. And there muſt be time: for we have to deal with ſovereign and powerful nations, whoſe rights we cannot infringe: we muſt therefore ſolicit, and not extort. But ſeparated from the United States, and, of courſe, from the friendſhip of France and the world, what hope have we, to bend the haughty nations of Britain and Spain. We ſhould be their ſport, or their ſlaves. *Sept. Seſſ.* 1794.

In rejecting the conditions now offered us by government, we cannot hope to extort a repeal of the exciſe law. If we would remove it by force, we muſt be able to cut ourſelves off from the United States, with the loſs of our proſperity, our happineſs, and perhaps our exiſtence. A rejection of the conditions is a declaration of war, and war is the ſure road to ruin.

Let us next conſider what will be the conſequence of our ſubmiſſion to government, on the terms offered.

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We are reſtored to the peace and protection of government. We ſhall be tried, for offences or delinquencies, by courts and juries in our neighbourhood. But, with theſe favourable terms, we muſt ſubmit to the exciſe law.

The peculiar objection, which lay in the mouths of the people on this ſide of the mountains, to this law, was this: that from our local circumſtances, it drew from us a ſum of money, which was diſproportioned to our wealth, and would ſoon exhauſt our circulating medium. However neceſſary, on theſe grounds, an oppoſition to the exciſe law might be, three years ago; it is *leſs* neceſſary now. Since that period, the progreſs of this country to wealth has been amazingly rapid.—There have been more public and private buildings raiſed, within this period, than for nine years preceding; and fewer ſheriff's ſales for debt, in the whole three, than in any one of the nine. Three years ago, I believe, there was not a burr mill-ſtone in this country: now there are many. The quantity of money circulating among us is, ſince, greatly increaſed, and the value of all property is thereby greatly increaſed; in other words, the value of money is greatly leſſened, and, thereby, the value of the exciſe to be paid by us, is greatly leſſened. *Then* there was hardly any trade to the Spaniſh ſettlements on the Miſſiſſippi; it was, at any rate, ſmall, and confined to a few adventurers: the quantity of grain exported was but little, of courſe, but little was withdrawn from our own conſumption; and this little was generally bought with goods. Now a very reſpectable trade is carried on to the Spaniſh ſettlements; our traders are treated with great civility by the Spaniards; the duty on our trade is reduced to a mere trifle; and there is very little difficulty in bringing away dollars in return. We ſhall ſoon have the whole ſupply of that market, to ourſelves. Laſt Spring, our beſt flour was ſold there a dollar each barrel dearer, than flour from New-York. None of the traders *now* depend on goods, for the purchaſe of wheat; but muſt purchaſe, at a reaſonable price in money. From this increaſed exportation of our grain, the neceſſity of diſtillation is greatly leſſened in degree, and will, every day, leſſen. Government does not *now*, as *formerly*,

ſupply the army with whiſky, through contractors purchaſing with goods; but employs agents to purchaſe it with money. Laſt year ten thouſand dollars were laid out, in this way, by one agent in this country; and the execution of an order for ten thouſand more, was ſtopt only by the preſent troubles. The contractors themſelves have, theſe two laſt years, purchaſed their ſupplies with caſh. From theſe circumſtances, and the pay and other expences of the army, government ſends *far* more money to this ſide of the mountains, than it can draw back by the exciſe. At the commencement of this law, a very great quantity of foreign ſpirits was conſumed in this country. But, ſo heavy is the duty which this law lays on foreign ſpirits, that the people on the Eaſt ſide of the mountains, drink ſuch ſpirits at a very increaſed price, and our ſtore-keepers cannot afford to bring foreign ſpirits, in any conſiderable quantity, over the mountains. *Sept. Seſſ.* 1794.

As our circumſtances are thus materially changed, ſo the law itſelf is changed alſo. Originally, the duty on a ſtill was ſixty cents per gallon; now, it is fifty-four. Originally, the duty on the gallon of whiſky was nine cents; now, it is ſeven cents. Another material alteration is, granting a licenſe by the month, at ten cents per gallon on the ſtill; a proviſion peculiarly ſuited to a country, where few diſtillers work in ſummer.

I do not ſay, that, by theſe alterations in our circumſtances, and in the law, our objections to the exciſe law are *removed*; but they are ſurely leſſened. We have reaſon alſo to believe, that our remonſtrance would be liſtened to more effectually, if, by obedience, we put ourſelves in a capacity of being heard: but it is natural to anſwer, "why complain of a law, which you have never obeyed." I will go yet further, and ſtate an opinion, that the eaſieſt, the ſpeedieſt, and, I believe, the only way, to accompliſh our object, a total repeal of this law, is inſtantly to accept the conditions offered by government, honeſtly comply with them, and come fairly before the legiſlature, with our remonſtrance.

I have, before, ſtated the impoſſibility, that the legiſlature ſhould repeal this law, ſo long as we reſiſt it. I will now explain to you, on what grounds I form the opinion, that they will repeal it as ſoon as poſſible, after,

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by our ſubmiſſion, we have reſtored them to their authority; and you may judge for yourſelves of the probability of this opinion.

The preſent proſpect of French affairs, and the favourable reception, which Mr. Jay, our ambaſſador, has met with in England, give reaſon to hope for a good underſtanding between us and Britain, and a conſequent termination of the Indian war. I eſtimate two years, as a reaſonable period for theſe cauſes to operate, and theſe effects to be produced. If the extraordinary expences of the Indian war ceaſed, there is reaſon to expect, ſuch is the increaſing trade of America, that the impoſts would ſuffice for the ordinary expences of government. If this be true, ſo generally is the exciſe on domeſtic produce diſliked, and ſo imperfectly paid, that we have no reaſon to preſume, that the legiſlature will keep it up, longer than it is neceſſary. You have now the grounds, on which I ſtate the opinion, that it may be repealed in two years. If repealed then, it will have laſted five years; of theſe five, we ſhall, perhaps, if we comply now, be compelled to pay for only two years; and, ſuppoſing the tax ſo unequal, paying but two years out of five, may correct the inequality; and, while we pay, a far greater ſum, for the expences of the war, is circulated among us. Thus the Indian war, occaſioning the exciſe, bears with it a remedy; and, when this remedy fails, there is reaſon to expect, the evil may alſo fail.

Whether, therefore, we would avoid ruin, or whether we would obtain a repeal of the exciſe law, it appears evident to me, that we have no way to gain our point, but by immediately accepting, and faithfully performing the conditions propoſed.

If we do not, we ſhall no more get caſh for our whiſky. The army will be ſupplied with whiſky from Kentucky. And regulations will doubtleſs be made and exerted, to ſeize and forfeit our whiſky, if carried any where out of this country. We ſhall, therefore, become its only conſumers; and it will again ceaſe to be a caſh article, and again become a mere drug.

But it is ſaid, that, if we ſubmit now, we have nothing to expect from a remonſtrance; for our paſt remonſtrances have been ineffectual. I ſay, it is too haſty,

to draw this concluſion. Beſides what I have formerly obſerved, that we have never, by obedience entitled ourſelves to relief; I requeſt your attention to the ſituation of the United States hitherto. The impoſts have not been ſufficient for the expences of government, including thoſe of the Indian war. The exciſe law, therefore, could not be repealed, unleſs ſome new fund were ſubſtituted in its ſtead. Now, it is impoſſible, to impoſe any tax whatever, that will operate equally on all men. Suppoſe, therefore, ſome other tax impoſed, in lieu of this, while we continued to reſiſt this: What would be the conſequence? It might be as unpopular *here*, or in ſome other place, as this exciſe; the conſequence would be, that, from an experience of the weakneſs of government, in failing to enforce the exciſe, the new tax would be reſiſted alſo, and *no* tax would ever be enforced.* Suppoſe a direct tax, on a general valuation of property; there would be great frauds. Suppoſe a direct tax on lands. The amount of all direct taxes, in each ſtate, muſt be in proportion to its number of inhabitants;† now, unleſs lands, or other property, in quantity and value, bore the ſame proportion in each ſtate, with the number of inhabitants, to the whole, the direct tax would, in ſome ſtates, be unconſtitutional, and, of courſe, reſiſted. I am informed, that in New England, a direct tax would be as unpopular, as the exciſe is here. Government, therefore, could not, with ſafety, ſubſtitute any other tax, inſtead of the exciſe, till it had firſt ſhewn, that its authority was ſufficient to enforce the exciſe. *Sept. Seſſ.* 1794.

Attend, eſpecially, to the ſituation of the United States, during the laſt ſeſſion of congreſs, and judge for yourſelves; was that a time to releaſe any eſtabliſhed ſubject of taxation, and try a new experiment? The whole world ſeemed to lower upon us. The Indians attacked our back ſettlements. The Algerines plundered, and the Britiſh captured, our ſhips at ſea. It was judged neceſſary, for ſafety and juſtice, to equip a fleet, to fortify our harbours, and to ſend out againſt the Indi-

* *A direct tax, impoſed by a law of Congreſs, produced, in* 1799, *an inſurrection in Northampton County of this State.*

† *United States Conſt. I.* 2.

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On all theſe grounds, I do moſt earneſtly exhort to an immediate acceptance of the conditions offered by the commiſſioners, and a faithful performance of them, on our part; as the only way, in which we can hope for redreſs, or eſcape ruin.

I have thus expreſſed my ſentiments honeſtly and freely, as, at this criſis, it becomes every man, who has any regard to the welfare of this country, to take every occaſion to do. This is not a time for concealment or diſſimulation. Let every man ſpeak out; and let us not, by ſilence or falſehood, deceive one another. Let a free currency of opinions reſtore mutual confidence, and mutual ſafety: that the dagger of the aſſaſſin, the torch of the incendiary, and the tongue of the ſlanderer, be not feared. Let the energy of government be reſtored; let the public peace, and the rights of perſons and property, be preſerved ſacred; and let every individual repoſe, with confidence and ſafety, on the protection of the law. Let the power of puniſhment be exerted only, as our principles preſcribe, by courts and juries; let offences be aſcertained only by the volumes of our laws; while a man's words and actions are lawful, let his ſafety be untouched; and let not individuals aſſume the public duty of repaying vengeance.

Do you, gentlemen, who, by your ſtation can do it ſo effectually, unite with me in expreſſing, propagating, and ſupporting theſe ſentiments; and through you, both now and hereafter, let them be felt to be the voice of your country.

They are mine.—And were an angel from Heaven to charge me, to make to you, as I ſhould anſwer it at the tribunal of God, a faithful declaration of my opinion

of the intereſt of this country, at this important period; I would, were it the laſt moment of my life, addreſs you, as I have now done. And O! may the God of wiſdom and peace inſpire this people with diſcernment and virtue, remove from their minds blindneſs and paſſion, and ſave this country from becoming a field of blood. *Sept. Seſſ.* 1794.

P. S. [The meeting at Redſtone not having given the aſſurances required by the commiſſioners, but appointed a committee to obtain better terms; the commiſſioners changed the terms, to individual ſubſcriptions of aſſurance by every man, in theſe counties. When theſe terms were declared, I exhorted to a compliance with them in the delivery of this charge in the ſeveral counties, adapting the expreſſions to the circumſtances. The following paragraphs are as delivered at Waſhington, 22d September, 1794.]

It may not be amiſs to ſuggeſt, that, notwithſtanding the limited time is expired, it may ſtill be proper, for thoſe who have not ſigned the form of acknowledgment of ſubmiſſion, yet to ſign it before ſome magiſtrate. Signing it is no admiſſion of paſt offence, nor any additional obligation of duty, in any particular perſon. It is merely that criterion of civil duty, which our fellow citizens have thought proper to require after a general appearance of departure from it. And to this duty we are equally bound, whether we ſign or not.

You, gentlemen, are guardians of the public peace of this county. At this time, it is peculiarly incumbent on us, to watch over the preſervation of the peace. Notwithſtanding the aſſembling of an army, under the diſcouraging view of our reluctance to return to our duty, and of our perſiſting in acts of violence, we may yet perhaps ſave ourſelves from the diſgrace and injury of its entering among us, by manifeſting to government plain proofs of our ſubmiſſion to its authority, and our firm determination, to preſerve the peace. Let us not have it ſaid, that our reformation has been accompliſhed by fear of an armed force; but from a generous reflection on paſt error, a ſincere ſenſe of duty, and an honorable purpoſe of recovering the eſtimable character of good citizens. The people of this country, I always hoped, and ſtill truſt, more and more, to be convinced,

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have good ſenſe and virtue, ſufficient to entitle them to the reſpect and good will of their fellow citizens of the United States. One raſh ſtep may be obliterated, by an uniform tenor of regular demeanor; and our name may be reſtored to its due credit. But if we would arreſt the threatening hand of government, if we would honourably deſerve the character of good citizens, let us now, at this critical moment, watch, with peculiar care, againſt the leaſt ſymptoms of violence, outrage, or breach of the peace. Let all tumults, tumultuous aſſemblies, appearances or words of ſedition, be inſtantly diſcouraged, ſuppreſſed, and, if neceſſary, brought under the coercion and puniſhment of the civil authority. This alone can ſecure to us that peace, which we had lately loſt, and preſerve us from that fatal anarchy, in which we were lately plunged: for, if civil authority be not ſupported by ourſelves, it muſt be ſupported by ſome other force. This alone can prevent an armed force from entering our country, and expoſing our peaceable citizens to the private plunder of troops not inured to diſcipline, and irritated by our miſconduct. This alone can ſecure to us that pardon and indemnity, which the generoſity of government has held out to our former offences, and of which another outrage would certainly deprive us. And this alone can reſtore to every man among us, that ſhield of protection againſt fear and danger, which law and government only can furniſh; and make us ſit ſecurely in our houſes, and ſleep ſoundly in our beds.

In the neighbouring counties, reſolutions have been entered into, for preſerving the public peace, and ſupporting the civil authority. In two of the counties, perſons uttering inflammatory and threatening expreſſions have been put in gaol. I truſt the county of Waſhington will be behind none in duty, and love of peace, and will ſhew itſelf as reſpectable in the virtue, as it is in the number of its inhabitants. We may eſpecially expect from all peace officers, juſtices, ſheriffs, and conſtables, watchful and earneſt exertions of their duty and power, for the eſtabliſhment of peace and tranquility; and from all the well-diſpoſed citizens ready aid and concurrence, in ſupport of the authority of officers, and the maintenance of the happineſs, honour, and virtue of this country.

No. XIII.

Remarks on the late Insurrection.

THE late insurrection in this country, from the numbers concerned in it, the manner in which it was conducted, the object it proposed to accomplish, the fatal effects which it produced, and the melancholy prospects which it exhibited; may be considered as the most alarming event, that has occurred in America, for many years. When authority has been encountered with tumult, and laws have been suspended by armed men, when the rage of some citizens has attacked the lives of other citizens, and destroyed their houses and property by fire; every man of a sober mind must be impressed with concern, and seriously consider, to what these things tend. *December Sessions, 1794.*

That a people struggling against usurped powers, should oppose oppression by violence, or that, in the state of inflammation which is produced by a revolution, occasional outrages should break forth, no man will wonder. But that a people living under a settled and free government of laws, established by their own will, and changeable when, and to what they please; should have recourse to force, to repeal or alter their laws; or to any thing but authority, to redress their grievances; is not less absurd in itself, than destructive to liberty; and will more effectually promote arbitrary power, discredit democracy, and shew the inefficacy of a free representative government, than all the arts and arguments, which its enemies have ever invented.

All governments are liable to change: all have had their changes; for no human art or invention is perpetual. The freedom of the savage state is, by degrees restrained, by the rules which are necessary, to preserve one man, from the force or fraud of another. As wickedness becomes more ingenious or daring restraints are multiplied, or, in other words, the powers of government are enlarged. Every new act of violence in the people becomes an argument for a new accession of force

Dec. Seſſ. 1794. to the government, till arbitrary power is gradually veſted in one man, as the only remedy, for preſerving every man from the injuſtice of every other. Such *has been* the progreſs of governments; and ſuch, by the violence of paſſions, *may be* the progreſs of ours.

We profeſs to admire liberty, and to reſpect the principles of a democratic republic, as the beſt ſource of government; and we conſider our own government as founded on thoſe principles. Will we be honeſt in our profeſſion, and act on the principles which we admire? The principles of a democracy are, that the whole people, either perſonally, or by their repreſentatives, ſhould have the power of making laws. But what law is it, in which the whole people would concur? So various are the faculties and the intereſts of men, that unanimity of many, in any meaſure is ſeldom to be expected; of a whole people, almoſt never. If no law were to be made, therefore, till the whole people ſhould aſſent to it; no law would almoſt ever be made. But as laws muſt be made, there is a neceſſity, that the will of ſome of the people ſhould be conſtrained; and reaſon requires, that the greater number ſhould bind the leſs. In our government, therefore, the will of the majority is equivalent to the will of the whole, and as ſuch muſt be obeyed; unleſs we will avow, that we mean to change or deſtroy the principles of our government, by violence and terror, and abandoning reaſon, the principle of action in man, degrade ourſelves to the rank of brutes.

To permit or aſſume a power in any particular part of a ſtate, to defeat or evade a law, is to eſtabliſh a principle, that every part of a ſtate may make laws for itſelf, or, in other words, that there ſhall be no law, no ſtate, and no duty; but a complication of ſeparate ſocieties, acting each according to its pleaſure. Thoſe ſocieties will again be ſubdivided; for a majority, or the whole, of any ſociety, will have no authority, to controul any one refractory member. Each man in the ſtate will be free from all law, but his own will. Government and ſociety are then deſtroyed; anarchy is eſtabliſhed; and the wicked, and the ſtrong, like ſavages and wild beaſts, prey on the whole, and on one another.

Such are the natural and neceſſary conſequences of

oppoſing a law by force. This oppoſition, perſiſted in, muſt terminate, either in anarchy in the people, or tyranny in the government; and in either caſe, muſt terminate in the deſtruction of thoſe republican principles, which we profeſs to admire, and are bound to ſupport. If the government yield, one example of ſucceſsful violence will excite ſome other part of the people, for ſome other cauſe, to purſue the ſame unwarrantable means, for the attainment of a favourite object. Every law will be oppoſed, in ſome quarter, by intereſted men. Indulgence to ſome will neceſſarily beget indulgence to all. There will be no law, the wicked will have no reſtraint; happineſs will no longer exiſt; mutual jealouſy, diſtruſt and terror, will pervade all; theſts, robberies, and murders, will ſpread over the country; and every man will be the enemy of every other. If the government exert its force, the reſiſtance, which it will experience, and the difficulty, with which it will overcome it, will convince the whole people, or the well diſpoſed, and the greater number, that there is a neceſſity of abridging the privileges of the citizens, and arming the government with greater power. To repreſs improper violence in the people, powers, otherwiſe unneceſſary, will be given to the government; and thoſe powers will be increaſed by every new occaſion of violence, till a tyranny is eſtabliſhed. And this is the moſt probable reſult of tumults, riots, and inſurrections. For all good men are inſtantly impreſſed with indignation and reſentment againſt them, and diſpoſed to lend their aid to government to puniſh and reſtrain them. And, in the choice of anarchy or tyranny, the laſt, as the leaſt evil, will be preferred. *Dec. Seſſ.* 1794.

I hold therefore, that a forcible oppoſition to law, inſtead of favouring liberty, is the ſureſt way to deſtroy it. Is then forcible reſiſtance to law never juſtifiable? Never; if the law be conſiſtent with the conſtitution. If a law be not contradictory to the principles of the conſtitution, however erroneous thoſe principles be, it is entitled to obedience. If a law be bad; let thoſe who diſlike it apply, by petition to the legiſlature, for its repeal. If the legiſlature refuſe, let the petitioners change their repreſentatives. If a law be repugnant to the conſtitution, the conſtitution, being the paramount

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authority, ſilences the law and makes it void. To an unconſtitutional law therefore, forcible reſiſtance may be juſtifiable; but even in this caſe, it is not prudent; but highly dangerous, becauſe the reſiſter makes it at his peril, and has no other rule but his own opinion, which may be erroneous. For individuals to exerciſe the right of determining that a law is unconſtitutional, is dangerous to themſelves and to the peace of the ſtate. And even the exerciſe of this right by the judiciary (to whom it certainly belongs) may ſometimes be invidious, and occaſion jealouſies and reſentments between them and the legiſlature. In the caſe of an unconſtitutional law, an appeal to the judiciary ought not to be made without neceſſity; and to individual force never, till all other remedies are exhauſted. Thus, according to the genius of our government, oppoſition even to an unconſtitutional law, ought to begin, as oppoſition to a bad law; by petition to the legiſlature for its repeal, or by a change of repreſentatives. If thoſe meaſures fail, the validity of the law muſt be queſtioned, examined, and eſtabliſhed or annulled, in a court of juſtice. In this manner it becomes us, as friends to liberty, to ſeek for every amendment, either of a law or of the conſtitution, in a peaceable manner; for, to attempt it by force, implies an apprehenſion, that the alteration attempted will not bear the teſt of reaſon, nor receive the approbation of a majority. If either the law or the conſtitution diſpleaſe a majority, the majority can alter either. If either the law or the conſtitution diſpleaſe a minority, the minority muſt ſubmit, or retire from the territory of the ſtate. Theſe are the principles of democratic republics. By theſe principles, if we examine *our* reſiſtance to the exciſe law, we ſhall find it as unjuſtifiable in its nature, as it was outrageous in its degree. A power to lay and collect exciſes was explicitly veſted in congreſs, by the conſtitution of the United States. This power received a very full diſcuſſion, and deliberate ſanction from all the ſtates in their conventions. And four of the ſtates (Maſſachuſetts, South Carolina, New Hampſhire, and New-York) to the ratification of the conſtitution, annexed declarations of their opinion, that congreſs ſhould not impoſe direct taxes, unleſs the amount of the impoſts and exciſes ſhould be inſufficient for the

public exigencies. According to the opinion of thoſe ſtates, therefore, congreſs, inſtead of being cenſurable, for not preferring a direct tax to an exciſe, would have been cenſurable, if they had impoſed a direct tax, till the laſt extremity. *Dec. Seſſ.* 1794.

All our benefits are mingled with ſome degree of inconvenience. The union of the ſtates under a general government, while, by combining the whole ſtrength, it renders the ſtates reſpectable and proſperous, may be truly conſidered as eſſential to our ſafety and happineſs, and as one of the greateſt political benefits, which we can poſſeſs. But it is neceſſarily attended with this inconvenience, that the laws, which from their nature muſt be general, will often be leſs adapted to the circumſtances of ſome ſtates, than of others. The ſuffering ſtates muſt ſeek conſolation under this evil, from the principles of mutual conceſſion; and remedy for it, from time, experience, and reciprocal inequality of taxation. If this tax bear peculiarly hard on this country, there may be other taxes, which bear peculiarly hard on other parts of the United States, and affect us but little. I know not whether I ought to reckon of this number, the tax on property ſold at auction, the tax on the manufactory of ſnuff and refined ſugar, or the tax on licenſes for ſelling wine or foreign ſpirits by retail; but of this number, I ſurely may reckon, ſo far as it goes, the tax on carriages for the conveyance of perſons. If all theſe taxes do not, the laſt certainly does, affect others chiefly, and us but little: the laſt, I may rather ſay, affects not us at all. They were all impoſed in the laſt ſeſſion of congreſs; and if the progreſs be perſiſted in, all may correct the inequality of each; or the intereſts of all combining, for mutual protection, and inſtructed by obſervation and experience, may, in time, produce the repeal of all, if a new ſyſtem, more acceptable in its nature, and more eaſy in practice, can be introduced. In the mean time, while we murmur at the inconvenience of any law, let us ſeriouſly reflect on the difficulty of making laws, equal and acceptable, to ſo extended and varying a territory, as that of the United States. And, conſidering the fraternal band, which ties us together, and the ſource of our laws, from

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Together with theſe general principles, the particular circumſtances of this country preſs upon us a faithful ſubmiſſion to this law, as a point of conſcience, honor, and ſafety. If we do not *yield*, an armed force will *compel*, a punctual obedience. The law *will* be executed; and let us not render it impoſſible, for government, to execute it by proper perſons. As a public office, become neceſſary for our honor and ſafety, let us render its execution reſpectable, and encourage and protect honeſt and reſpectable men in it. We may thus, in ſome degree, leſſen the burden of the law, and render our obedience more pleaſant to ourſelves.

God forbid, that any man among us ſhould entertain the horrid idea, that ſecret aſſaſſination ſhould accompliſh the work, which it is found no longer ſafe, for open inſurrection, to attempt. When danger to its very exiſtence has once rouſed the power of government, no art or machination, nothing but implicit ſubmiſſion, can reſtore ſafety to the aggreſſor. Even for our own ſecurity from each other, ſuch an idea is one of the moſt dreadful, that can be conceived. Vices, the moſt daring and deteſtable need only a plauſible introduction, to render them familiar and general. One inſtance of aſſaſſination, of the moſt odious perſon among us, would render the life of the moſt reſpectable altogether unſafe.—For aſſaſſination is the work of a ruffian: and is there any perſon, whom a ruffian will reſpect? Caſt a moment's reflection on our late troubles, and tell me, what kind of villainy there is, which all at once, did not become faſhionable. Chopping off heads was ſpoken of as eaſily, as ſlicing a cucumber; and burning houſes became as trivial, as tearing waſte paper. Introduce aſſaſſination, or any other ſpecies of crime, under a plauſible pretence, and it will ſoon ſpread over the country, and extend to every object.

The late troubles exhibit an awful leſſon, which it would be inexcuſeable to paſs over, without attention and improvement. During their exiſtence, the paſſions

were too much excited, and the mind too little at leiſure, to examine thoroughly their nature or effects; and terror debarred the exerciſe of freedom of opinion and expreſſion. But now, when the ſtorm is over, it becomes our duty, to look back on the paſt ſcenes, to contemplate the ruins it made, and ſpeaking of the leading tranſactions freely and without diſguiſe, to beſtow ſome ſerious reflections on their nature and tendency. Theſe reflections, while they afford us an opportunity of remarking, how fatal to happineſs is a reſiſtence to lawful authority, will ſhew us alſo how oppoſite to liberty anarchy is. *Dec. Seſſ.* 1794.

Some of the plaineſt dictates of perſonal liberty, if not its moſt eſſential principles, are, that every man be free to think, to ſpeak, and to act, as his inclination and judgment may lead him, provided he offend not againſt any law; that no man ſhall be tried or puniſhed, according to the arbitrary will of any individual, but according to the eſtabliſhed forms and rules of the law; and that the enjoyment of every man's property ſhall be ſecured to him, untill he forfeit it by the ſentence of the law, and that ſentence be executed by the proper officer. With theſe maxims, compare the effects of anarchy, as we have experienced it. Becauſe the intereſt or inclination of ſome men led them to accept and execute certain offices, eſtabliſhed by public authority, lawleſs bodies of men, aſſembled for the purpoſe of riot and violence, ſeiſed, inſulted, and abuſed their perſons, entered their houſes by force, and deſtroyed both their houſes and property by fire. If any thing can place ſuch tranſactions in a more deteſtable light, than, at firſt ſight, they muſt appear, it may be this: that, if theſe things may be done, for any cauſe, however good, there needs no more, for their execution, for every cauſe, than that the party to execute them be of opinion, that the cauſe is good. Let but a mob aſſemble, however ſmall it be, if ſufficient to accompliſh its purpoſe; let them agree in opinion, that ſuch a man is dangerous, and therefore, that his property ought to be deſtroyed; and it is inſtantly done. Let but one man hate another, and reſolve to deſtroy him; he has only to aſſemble a few of ſimilar ſentiments, or over whom he has influence;

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they inſtantly pretend to be the people; and the work of malice is accompliſhed, under the ſemblance of zeal for the public good.

The outrages of anarchy were not confined to public officers. They extended alſo to private citizens, of reſpectable character and inoffenſive manners. Variety of opinion ſeems to be as natural to the human mind, as variety in ſhape, features, and complexion, is to the human body. Both ſeem to be the work of our Creator: neither can be a proper cauſe of puniſhment; and to puniſh, for either, is the groſſeſt tyranny. Actions, which ſome may think meritorious, others may think deteſtable; and a law, which ſome may think bad, others may think good. But ſurely no man of ſenſe and virtue will think that any man ought to be puniſhed, for entertaining or expreſſing either of theſe opinions, or for acting as if he thought a law good. Yet, for ſuch cauſes, were men, who had offended againſt no law, ſevered from all the attachments of domeſtic life, driven from their families and homes, it might have been, to wander, they knew not where, and to ſubſiſt, they knew not how; under the fear and peril of death, if they ſhould return. Is this liberty? Such is the liberty of anarchy.

To a private letter, a ſacred reſpect, ſomewhat reſembling the ancient myſteries of religion, has been uſually annexed; and to violate its ſecrecy, requires the ſuſpicion of a coward, and the villainy of a traitor. Yet, for no object, that I can perceive, of any public nature, but only to gratify the little revenge of a malignant mind, or to ſhew, that there was no crime, which we were not ready to perpetrate; the public poſt was robbed, and the letters in the mail were opened, by a ſet of ſelf-created inquiſitors, who, advancing from one degree of guilt to a greater, aſſumed the authority of government, and called out the militia of the country, to ſhare and cover their crimes.

Theſe tranſactions furniſh us with this melancholy inſtruction, that when men have once tranſgreſſed the bounds of civil obligation, and violated public authority, there is afterwards, no reſtraint to their exceſs. They will do deeds, which they never before intended, and from which, had they been ſuggeſted, they would have ſhrunk back with horror; and they will do them, from no motive,

and to no end of intereſt to themſelves or others; but merely from the raſhneſs of the moment, a faily of wantonneſs, or an impulſe of malice. Let us learn, therefore, to confine our conduct within the ſtrict line of duty, and remember, that the firſt tranſgreſſion renders eaſy every ſubſequent one, however enormous. *Dec. Seſſ.* 1794.

I will ſtate one or two cauſes, founded in ignorance and error, which contributed to the late unhappy inſurrection, or facilitated its progreſs.

I ſhall mention, firſt, *an opinion, that riots and terror, baniſhing the officers of exciſe, would produce a repeal of the exciſe law, or its inactivity with reſpect to us*; but I have ſaid ſo much of this, on other occaſions, that I ſhall but mention it now, and paſs it by, without further notice. I ſhall next mention, *a deſire to cover the guilt of thoſe who firſt attacked general Nevill's houſe.* As, it ſeems, an opinion pretty generally prevailed, that riots in this cauſe were proper; it appeared hard, that thoſe who engaged in them, ſhould ſuffer, for their ſervices in the public cauſe; and it ſeems to have been believed, that the beſt way, to protect them, was, by multiplying the number of offenders, to make the puniſhment of any appear dangerous. Perhaps, here, one might find matter for queſtioning, whether it be not deſirable, that wickedneſs ſhould be accompanied with underſtanding; and whether folly be not the moſt miſchievous of all qualities. Had the men who incited the ſecond attack on general Nevill's houſe, and the ſubſequent tranſactions in the inſurrection, been men of ſound well informed judgment, they would have reaſoned in this manner. "The rioters have erred; but we have countenanced and ſhared the opinion, from which their error proceeded; and we ought to endeavour to ſave them. Let the whole country now riſe, and ſeize and ſecure them, for public juſtice. When this is done, let us go forward to government, with ſolemn and ſincere aſſurances, that we will ſubmit to this law honeſtly and punctually, and that, if required, we will pay for all paſt damages and delinquencies: and with theſe aſſurances, let us requeſt, that government forgive our offending brethren." If meaſures of this nature had been purſued, the iſſue would have been more fortunate, to the offenders, to theſe counties, and to the United States.

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Another cauſe, which I ſhall mention, is, *a mistaken uſe of the word people.* As, in a democracy, the people is the ſource of all authority; and as the people on this ſide of the mountains ſeemed all to agree, in reprobating the exciſe law; declaimers, never extending their views beyond their own neighbourhood, but conſidering the people *here*, as the *whole* people, took occaſion to repreſent, that the people *here* might lawfully correct any errors of their public ſervants. On theſe principles, every neighbourhood, conſidering itſelf as the people, thought it had a right to do, as it pleaſed. Aſſuming, as what needs no proof, that the union of all the ſtates is neceſſary for the proſperity of each; and that, ſeparate from the union, we ſhould be inſignificant and dependent; I would obſerve, that it is the *whole* people of the Union, that is the ſource of all power, and that we are but a very ſmall portion of the whole people. And, becauſe the whole people is the ſource of all power, to argue, that a very ſmall portion of the people is the ſource of all power, is abſurd. If every ſmall portion of the people were to aſſume the powers of the whole, inſtead of a government, we ſhould have a chaos of jarring authorities, and conflicting wills. While the conſtitution ſubſiſts, even the whole people can ſpeak only in the conſtitutional manner, by their repreſentatives. So that the only voice of the people is the laws. And the laws muſt be preſumed to be the will of the people, until the repeal of them declare, that the people have changed their minds.

I ſhall mention but one other cauſe, which facilitated the progreſs of the late inſurrection. The danger of this country from Indian incurſions, had rendered it often neceſſary, to aſſemble the militia, without waiting for the orders of government, which would come too late for the danger. From experience, it was found, that attack was the beſt defence. Hence voluntary expeditions into the Indian country were frequently undertaken; and government, from a ſenſe of their utility, afterwards ſanctioned them, by defraying their expences. In this manner, *it had become habitual with the militia of theſe counties, to aſſemble at the call of their officers, without enquiring into the authority or object of the call.* This habit, well known to the contrivers of the rendez-

vous at Braddock's field, rendered the execution of their plan an eaſy matter. They iſſued their orders to the officers of the militia, who aſſembled their men, accuſtomed to obey orders of this kind, given on the ſudden, and without authority. The militia came together, without knowing from whom the orders originated, or for what purpoſe they met. And, when met, it was eaſy to communicate, from breaſt to breaſt, more or leſs of the popular phrenzy, till all felt it, or found it prudent to diſſemble, and feign that they felt it. This gave appearance, at leaſt, of ſtrength and unanimity to the inſurrection, ſilenced the well diſpoſed, and emboldened ruffians to proceed with audacity, to ſubſequent outrages, which there was no energy to reſtrain, nor force to puniſh. *Dec. Seſſ.* 1794.

In theſe reflections, we find nothing conſolatory: all is ſorrow and diſgrace. Let us turn then to the other ſide of the picture, and conſider the conduct of government, and of our fellow citizens in other parts of the Union.

A meaſure, no leſs prudent than generous, was adopted by the government. Commiſſioners were ſent to offer us a full pardon of all paſt offences, on the ſimple condition of future obedience. Leſt theſe terms, offered generouſly at once, and the beſt that could be offered, ſhould fail in reclaiming us to duty; the preſident ordered, that a competent number of our fellow citizens ſhould be ready in arms, to compel that obedience, which reaſon and mercy could not procure. While the terms were under our conſideration, there appeared a manifeſt reluctance in our fellow citizens, to draw their ſwords againſt their brethren. But no ſooner was it known, that we rejected thoſe terms, and threatened the government with war and diſſolution, than the conteſt among them was, who ſhould be foremoſt in the field. It was then no longer a doubt, whether a ſufficient number could be procured to go; but whether multitudes, beyond this number, could be perſuaded to ſtay. The merchant abandoned his warehouſe, the lawyer his office, the mechanic his ſhop, the gentleman his pleaſures, and every man the gains and enjoyments of domeſtic life; to endure hardſhips which they had never experienced before, and hazard their lives in defence of

Dec. Seff. 1794. the laws. At the call, "your country is in danger," the rich and the poor met together, forgetting all diſtinctions of ſtation and circumſtances, and blended in one common claſs of patriots. Even the pacific Quaker, whoſe principles reſtrain him from ſhedding blood, now aſſumed the garb and weapons of war, and marched in arms, to maintain the peace and government of his country.

In this we receive a leſſon of the power of government, and are taught, that, however riot and anarchy may triumph for a while, there is an energy and ſtrength in government, to cruſh them; that reaſon and the law are the only true protection of free citizens; that violence only brings ruin on its authors; that, in times of ſedition, it is the true intereſt of all, to be, not lukewarm and indifferent, but firm and perſevering on the ſide of public authority; and that the faithful friends of law and order, however borne down, for a time, will, in the end, be protected, and riſe above oppreſſion.

Even on this bright proſpect, of the generous and ſpirited conduct of our patriotic fellow citizens, a cloud intervenes. Though none of them fell by our arms, yet ſome have fallen victims to a change of climate and manner of living, an inclement ſeaſon, and ſeverity of fatigue, over ſwamps and mountains. Some gallant youths will never return to their anxious parents. Some parents will never return, to bleſs their children, in their dying moments. And ſome huſbands have expired, without a wife to cloſe their eyes. Can we think of this, without ſuſpicion, that their blood may be on our heads?

But, gentlemen, the paſt cannot be recalled: let us only ſtudy to improve by it; and ſtrive to make ſome compenſation, by our future conduct. For this purpoſe, let us ſuppreſs the firſt ſeeds of ſedition and riot, before they grow up as before, to a ſtrength not to be reſiſted. Let even words, tending to any violence or a breach of the peace, be held criminal. Let every witneſs of ſuch things carry the offender before a magiſtrate, that juſtice may be executed. And let every magiſtrate take heed, "that he bear not the ſword in vain." To permit criminals to eſcape from puniſhment, is to encourage crimes. Impunity begets offences, as corruption begets

maggots. A few examples of puniſhment of the late diſorderly, given among ourſelves, in each county, will, perhaps, ſecure our peace, for many years, and prevent the exiſtence of many crimes, and the neceſſity of many and ſevere puniſhments. *Dec. Seſſ.* 1794.

To your particular and ſerious conſideration, gentlemen, do I addreſs theſe ſentimen s. You are the door, by which only, juſtice may be come at. By you, a way may be opened to juſtice. By you, juſtice may be ſhut up. In your hands, the laws of your country have placed this authority; and for the exerciſe of it ſtrictly, according to law and truth, you are bound by your oaths, and anſwerable to your God. You have no diſcretion to do as you pleaſe: your opinions muſt be governed by the laws: your belief muſt be guided, by teſtimony; and ſo you have ſworn. It is not for you to determine whether it be *expedient*, that puniſhment ſhould be inflicted on any particular offender, but only whether it be *true*, that any particular perſon is an offender.

There are two reaſons which ought, particularly at this time, to induce juries, and all other officers concerned in the adminiſtration of juſtice, and all citizens, to diſcharge their reſpective duties, with preciſion, and carry the laws into execution with perfect exactneſs. An armed force is now in our country, for the purpoſe of enforcing ſubmiſſion to the laws. The ſooner we give ſatisfactory evidence of our voluntary and exact conformity to the laws, the ſooner will our country be cleared of this ſtain on its character. Further, a law has lately been paſſed, directing that certain caſes, which, formerly, were tried in the federal courts, *may*, now be tried in the ſtate courts; and experiments, under this law, are about to be made. We have now, in many caſes, an opportunity of being tried in our own counties, inſtead of being carried, for trial, to York or Philadelphia. But, if we ſhow any backwardneſs or bias, in doing juſtice, we cannot expect, that we ſhould be truſted with its adminiſtration, in thoſe caſes. Government muſt require ſtrict juſtice; and if this cannot be obtained, in our own courts, they will be ſhunned, as corrupt, and we ſhall be taken, for trial, to a diſtance, and have our caſes decided by others. If we wiſh, there-

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fore, to be delivered from a ſtanding army; or if we wiſh to have trials, in the caſes offered to us, in our counties; let us now, at this critical time, give ſpecimens of our being ruled by law. If we do ſo now, perhaps, after ſome experience of our virtue, the federal government may truſt us, in all caſes whatſoever, with trials in our own counties.

I do, therefore, ſolemnly adjure you, to deal faithfully, and make true preſentments, in all caſes of any breach of the peace, or other offence, eſpecially reſpecting the late troubles. This will be the true teſt of our integrity, and will determine, how far government ought to truſt us, with the management of ourſelves. Whenever a bill is ſent up to you, if it be proved true, I call upon you, as you regard your oaths, and the intereſt of your country to *find* it ſo. Where any offence is within the knowledge of any of you, I call upon you, by the ſame regard to your oaths and your country, that you preſent the facts to us, or give information of them to the proſecutor for the ſtate, that he may draw up a bill, to be *found* on your knowledge.

One offence, which I would recommend to your particular conſideration, is *the raiſing of liberty poles*. What is the liberty, which thoſe pole-raiſers wanted? A liberty to be governed by no law; a liberty to deſtroy every man who differed from them in opinion, or whom they hated; a liberty to do what miſchief they pleaſed. It is not *acts* of violence alone, which conſtitute offences. Offences may be committed by writings, by words, or by other ſigns of an evil purpoſe. The mere act of raiſing a pole is, in itſelf, a harmleſs thing; the queſtion is, what is the meaning of it. Thoſe poles were evidently ſtandards of rebellion, and ſigns of war againſt the government. They were raiſed by the ſeditious, with an avowed intent, to hold under fear all the well-diſpoſed and peaceable part of the community, to keep alive the ſpirit of riot and confuſion in the country, and to prevent the return of law, peace, and ſafety. And they produced all the ill effects, which were intended. They gave an opportunity to the violent, to know their ſtrength and one another. What was it but thoſe pole-raiſings, and their attendant circumſtances, that prevented our return to ſubmiſſion and

duty, and a general acquiescence with the terms offered by the commissioners, and made it necessary for government to march an army into this country, to subdue that spirit of sedition and riot, which blind madness first excited, and those pole-raisings kept alive? Will any man doubt, therefore, that raising those poles was criminal, that those were especially criminal, who raised them, after the arrival of the commissioners of government in this country? And those, above all, who raised them, after the generous terms offered by government, were made known. *Dec. Sess.* 1794.

Another class of offenders, perhaps yet more atrocious, consists of those, who, by violence or threats, prevented, or endeavoured to prevent, the signing of the acknowledgement of submission required by government, as the condition of our pardon and peace. Besides the fatal effects of this violence to the country, it was a restraint on that freedom of will, which every man has a right to exercise. Was it not a plain breach of the peace?—Was it not a plain declaration of war against government? Need I, gentlemen, use words to convince you, that it was a crime? I know, I need not.

Neither need I tell you, that those men are criminal, and ought to be subjected to prosecution, who took upon them, to burn houses, or abuse property or persons, for supposed misconduct. Those also are criminal, in a high degree, who assembled in parties, for the purpose of doing such things, though they never did them. This is a clear offence, and breach of the peace. It tended also, to keep up the terrors against returning duty, and rendered an army necessary, to remove those terrors, and restore the minds of the people to freedom and ease, and the country to peace.

Let me, in the words of scripture, point out the certain difference, between liberty and licentiousness. "So is the will of God, that you submit to every ordinance of man; as free, and not using your liberty for a cloak of maliciousness, but as the servants of God. For, brethren, ye have been called unto liberty; only use not your liberty for an occasion to the flesh; but, by love, serve one another."* True liberty, like true religion,

* 1 *Pet. ii.* 13, 16. *Gal. v.* 13.

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is known by its fruits. Liberty, the daughter of Heaven, and the beſt giſt of God, to a favoured people, a generous principle, whoſe object is the peace and proſperity of the human race, muſt produce fruits worthy of its divine origin. Licentiouſneſs, the offspring of Hell, and the ſcourge of an offending nation, ſelfiſh, in its nature, and ſeeking the degradation of all but itſelf, bears fruits of an oppoſite kind; ſedition, fury, hatred, malice, and miſchief. By its fruits, judge, whether our inſurrection proceeded from a ſpirit of liberty, or of licentiouſneſs; whether it was the work of God, or of the Devil.

Do your duty, gentlemen, and ſatisfy your own conſciences. Preſent all offenders, whatever, to the juſtice of your country. This you are bound, by your oaths, to do. Whether thoſe offenders ſhall be conſidered as proper objects of mercy, or of puniſhment, it is not for you to decide. That queſtion lies with others; and you cannot, take it up, without violating your oaths, and proſtrating the principles of our laws and government.

I ſhall conclude with exhorting to a ſpeedy and faithful compliance with two propoſitions, made to us, by the agent of government. One is taking an oath of fidelity, and of ſubmiſſion to the laws; and the other is, entering into an aſſociation, for ſupporting their authority, and protecting their officers.

It may be aſked, why ſhould we do ſo? I will give two reaſons.—1ſt. We have been great offenders: and we cannot give too ſtrong aſſurances of our return to duty. The aſſurances required ſeem due to our own character, and to the ſatisfaction of our fellow citizens. 2d. A temporary army is now, and a ſtanding army will be eſtabliſhed among us; unleſs we can convince government, and our fellow citizens, by unequivocal proofs, of our regular and ſincere habits of ſubmiſſion to law, and of our exertions to enforce obedience to all authority. If we refuſe compliance, government, and our fellow citizens, may ſuſpect, that there is a change only in our conduct, not in our hearts; that our ſubmiſſion is temporary and diſſembled; and that, if we believed it ſafe, we would again break out into riots. Let us prevent ſuch ſuſpicions, by our conduct; and, as we have rendered it neceſſary for government, to eſtabliſh

a force, to reſtrain us; let us render it proper, to withdraw this force. Let us begin, by taking this oath, and entering into this aſſociation, and continue in a faithful adherence to both. We may, thus, repair our character, and relieve ourſelves from the diſgrace of being governed by force, and a ſtanding army. *Dec. Seſſ.* 1794.

No. XIV.

Religion, Society, and Government, neceſſary for Man.

TO irrational animals nothing more ſeems neceſſary, than the means of preſerving exiſtence and health. And to the human ſpecies, in a ſtage of exiſtence, limiting the capacities and deſires to the enjoyment of theſe ſimpleſt wants of nature, nothing more ſeems neceſſary. But when men have arrived at maturity in condition and power, when exerciſe, experience, and reflection, have diſcovered and cultivated thoſe faculties peculiar to our ſpecies; when men have acquired the habit of digeſting their knowledge into a ſyſtem, and abſtracting their individual experiences, into general maxims; when the arts have extended the limited meaſure of their ſtrength, and ſpeculation has carried their thoughts and reflections from matter to ſpirit, diſcovered a diſtinguiſhing characteriſtic of their own, from every inferior ſpecies of animals, and diſplayed a new ſubject of ſtudy and ſcience; when ſomething, beyond all that our ſenſes can diſcover, ſeems to open to the mind, and an immortality to be allotted to the human ſoul, though the body crumbles into duſt; a new ſeries of powers, duties, and dangers, is unfolded, and, to this new ſtate and proſpect of things, new regulations muſt be adapted. *June Seſſions*, 1795.

All animals purſue a certain line of action. Other animals purſue, ſubmiſſively, the track pointed out to them by nature, without any ſenſe of merit or demerit. Man has a ſenſe of right and wrong.—Other

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animals appear like machines moved by a regular impulse of nature. Man the Almighty hath endowed with a portion of his own freedom of will, reserved for his moral government, and fitted for immortality. Other animals can express some of their wants and feelings. Man can communicate his experiences, his knowledge, the most abstract thought or imagination. All animals have a sense of pleasure and pain. Man has a sense of honour and shame. All animals may have a consciousness of present existence. Man has a hope of future life. All animals pursue a supply of the wants of the body. But, with these, man pursues a supply of many wants of the mind, many demands of imagination, many claims of futurity; he increases means, without any immediate object, acquires possessions, of which he can have no enjoyment, and accumulates abundance, which he can never exhaust: what he has acquired, he seeks to preserve from the rapacity of others; and endeavouring to multiply his means of happiness, he multiplies the means, by which his happiness may be attacked. Other animals arrive at that measure of dexterity allotted to their species, with little cultivation, and, as it were, spontaneously. Man, designed for a degree of skill of far larger bounds, the extent of which is perhaps not yet ascertained, comes to maturity slowly, with great labour and exertion, and, as it were, by continual force, constraint, exercise, and imitation. Man, a rational, moral, and immortal being, distinguished, by a mind, by a soul, by speech, by, if I may so term it, reflex sensibility, by a desire of property, and by a variety of other characteristics, of a nature altogether different from all other animals, must perceive pointed out to him a life very different from theirs, and a conduct regulated by principles unknown to them, but necessary to his happiness. He must perceive pointed out to him, religion, society, and government.

Even animals, in proportion, as, by sagacity and joint labour, they more or less approach the social and rational nature of man, more or less yield to subordination, and a form of government. It is true, there may be a naked and solitary savage, who excludes from his cave all social communication. Such a being, however, is hard to be conceived, and can seldom exist, but under ex-

treme preſſure of neceſſity, or diſtemper of imagination. *June Seſſ.* 1795.
It is true, there may exiſt ſocieties of uncivilized men, who refuſe to fetter their conduct, by the authority of government, or ſubmit to any force but phyſical ſtrength. Such ſocieties, however, if there be any, are rare, cannot long ſubſiſt, and are altogether incompetent for the purpoſes of rational life: for, in all ſuch, reaſon muſt be the ſlave of force. It is true, there may be, even in the ſocial and civil ſtate, individuals without any ſenſe of religion. Theſe inſtances, however, are not common, and they have been confined to a few individuals: for we have no knowledge of any ſtate, or even of any ſociety, exiſting without religion; and how far a ſtate or ſociety may exiſt without religion, is yet matter of ſpeculation. It is alſo true, that there may be life without reaſon. Although ſome of the human ſpecies *may* ſubſiſt without ſociety; although ſome ſocieties *may* ſubſiſt without government; although ſome ſtates *may* ſubſiſt without religion; there is yet no proof, that a life without ſociety, government, or religion, is natural or proper to man. Theſe things only prove, that out of the religious, ſocial, and civil ſtate, there may be animal life; but, to live as men and as immortals, we muſt have religion, ſociety, and government. It needs ſmall obſervation indeed, to ſatisfy us, that man can neither live comfortably, nor duly cultivate the faculties of his mind, but in ſociety and government. And, ſo far as the experience of all ages and nations extends, ſociety and government muſt be accompanied with religion. Moſes received his laws from God, and publiſhed them under the thunders of Heaven. Mahomet's authority and code were founded on communications with the Almighty. Numa enforced his ſyſtem to the Romans, by aſcribing to it a celeſtial origin. And the royal family of Peru were all children of the Sun.

Religion, conſidered as an impreſſion, has been ſaid to be the natural reſult of ſolitude and weakneſs. The mind deſtitute of viſible aid, ſeeks conſolation from inviſible power; and the ſilence and leiſure of ſolitude lead the mind to contemplation and reflection. Religion may therefore exiſt before ſociety and government; and has ſometimes led weak and diſtempered minds, to ſhun the civil and ſocial ſtate, to cultivate, in ſolitude,

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devout meditation. This, however, is an unnatural effect of religion, and leſſens, at leaſt, if not deſtroys its uſe. No knowledge or principle can be uſeful, but in proportion as it has influence on active life. Man, made for ſociety, deſerts his duty, in abandoning it. And, ſurely, a principle, of all others the moſt ſublime, was never intended for inactive meditation, or for a ſtate of ſolitude, unnatural to man. Religion muſt have been intended, to regulate our conduct in that ſtate moſt proper for our exiſtence and improvement, and to govern us, in the diſcharge of the active, ſocial, and civil duties of life. To confine it to retirement, is to pervert it. To apply it to its proper purpoſe, is to uſe it as a motive and a guide to uſeful actions, in a ſtate of ſociety and government.

Whatever conſolation religion may afford to the timid and ſolitary man, it contributes nothing to his ſkill and power, in the mechanical arts, neceſſary for comfortable ſubſiſtence. To form inſtruments of labour, to build a houſe, to procure means of ſubſiſtence, he muſt have companions. No manufacture or art, nothing, for which the mechanical powers or genius of man are deſigned, can make any progreſs, in a ſtate of ſolitude.—In ſociety, the experience and invention of every man and every age is communicated to all; a continued accumulation of experience is made; and a peaſant acquires the knowledge of a Bacon and a Newton. Every age of mankind, like every year of an individual, adds new information. Without ſociety, man remains always an infant, has every thing to learn, for himſelf, and never attains maturity. In ſociety, every generation ſets out, from that point of improvement, at which the preceding had ſtopt, and proceeds to further progreſs in dexterity and ſkill. Without ſociety, every man, in all times, without any additional progreſs, ſets out and ends, at the ſame point, as every other before him had done. A moment's reflection on the labour neceſſary to raiſe corn, or to accompliſh any other work of art, will ſhew the neceſſity of ſociety to man. And the effect of ſocial above ſolitary labour is far greater, than in proportion to the numbers employed. The attention of each being confined to fewer objects, and ſharpened by emulation, his dexterity, in the bounds of his occupation,

becomes more accurate and compleat. The wants and improvement of men thus eſtabliſhing ſociety; judgment, fancy, experience, and habit, point out what is proper or improper, and opinion, as a law, regulates the conduct. *June Seſſ.* 1795.

But ſociety would but imperfectly accompliſh its object, without government. Can the human paſſions, with all thoſe ſeductions, which ſociety offers, be left without any reſtraint, but decency and virtue? We know they cannot.—We know, that thoſe advantages and poſſeſſions, which we acquire in ſociety, cannot be preſerved in it, without government. What ſhall reſtrain the ſtrong ruffian, from breaking into our ſcenes of ſocial and domeſtic enjoyment, or rapaciouſly ſeizing the property and poſſeſſions, which we have provided as the means of comfort and ſubſiſtence? What ſhall reſtrain the cunning of the thief, or the malignant artifice of the ſlanderer? Government. Without government, ſociety is uſeleſs or deſtructive; and men will either have nothing to enjoy, or no enjoyment of what they have. Should, therefore, a number of ſtrangers, by chance meet in a deſert iſland, their firſt care, after ſatisfying their immediate wants, would be to form ſome kind of government; as a pledge, for the good behaviour of each, and a protection of the property of all. With government, ſociety, and religion, man may arrive at that degree of happineſs and improvement, which his preſent and future exiſtence can admit. Without thoſe, he may indeed live; but his life is miſerable; and is, at beſt, but the life of an animal, not of a man and an immortal.

1. Government, or an authority to control the actions of the whole nation, is differently diſpoſed, in different countries. Where deſpotiſm prevails, it is the will of one man. In a democracy, it is the will of the whole people, expreſſed in the laws: after the laws have declared the will of the people, the officers are but mere organs or machines, that ſpeak and act, as they are moved by the general will.

Of the neceſſity of government, and the difficulty of reſtraining the paſſions of men in ſociety without government, ſome idea may be formed from this circum-

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ſtance; that philoſophers, in forming theories of the hiſtory of man, have laid it down as a principle, that a ſtate of nature is a ſtate of war; the objects of poſſeſſion of each being conſtant objects of contention among all. No higher eulogy can be beſtowed on government, than what is involved in this, that it can reſcue ſociety from a ſtate of war, and eſtabliſh peace, and mutual amity. But it is not from theories, that men derive their eſtimate of things: and, juſtly to appretiate the importance of government, as of every other bleſſing, we muſt feel or know the want of it. Look to men, in a ſavage ſtate, before a regular ſyſtem of government is eſtabliſhed among them. Life, and all the means of enjoyment, are, every moment, a prey to the rage of the boiſterous, the malice of the vindictive, or the cunning of the inſidious. The progreſs of ſociety, multiplying the means of enjoyment, multiplies the incitements to rapine, and offers no conſolation. Plunder, and not honeſt induſtry, becomes a trade, and means of livelihood. In Africa, in Arabia, and other parts of Aſia, men prepare for a journey, as for a warfare. They muſt go armed, and in caravans, or large troops or companies. Every ſtranger is ſuſpected, or treated as an enemy. There being no force in government, to protect them, they muſt be, every moment, on their guard, to protect themſelves: and the weak or unwary traveller, or the defenceleſs inhabitant, is continually expoſed to armed plunderers, and in continual terror, like the inhabitants of an Indian frontier. If we would ſee, that neither the habits of ſubmiſſion to government, nor the experience of its benefits, can, without an actual, immediate, and conſtant exertion of its force, reſtrain the dangerous paſſions of men, look to nations in a ſtate of revolution, having thrown off one form of government, before they have eſtabliſhed another. How terrible are their paſſions! How fatal their effects. Look to people under a ſettled government, when, in times of riot or inſurrection, they ſhake off all reſpect of its authority, and all fear of its power. The obligations of juſtice, the feelings of mercy, and the ties of affection, are utterly deſtroyed; every rational, gentle, or benevolent principle is baniſhed; and man diſplays the rapacity of the wolf, and the fury of the tyger. As of

cowards, it may be ſaid of men unreſtrained by government, and of governments not firmly eſtabliſhed, or not duly reſpected and obeyed; that they are always cruel. A ſtable government, poſſeſſing the affection and obedience of its ſubjects, is merciful, becauſe it has nothing to fear. A brave man feels in himſelf a power of protection, and ſcorns a ſevere revenge. A timid man ſees ſafety only in the deſtruction of his enemy. Men under government know, that they have, in its power, a ſhelter from injury. Remove the authority of government, and you leave no arbiter, to decide between them and their enemies; and, to be ſafe, they ſeek to deſtroy all whoſe animoſity they fear. What has produced the many acts of cruelty, which, with, or without, the forms of law, have lately been perpetrated in France? Is it, that the French nation has leſs ſenſibility or juſtice, than other nations? No: it is becauſe that nation has been in a ſtate of revolution; becauſe the government was not eſtabliſhed: becauſe they apprehended, that the old form of government might be reſtored, and the innovators be called to an account by the former powers: becauſe no party or principle had acquired ſufficient ſtrength and permanency, to give its adherents confidence; and they fought their own ſecurity, in the death of their opponents. What was it, that, during the late inſurrection in theſe counties, rendered ſentiments of cruelty and outrage ſo familiar to the people here? Have they, in their nature, any peculiar propenſity to ſuch ſentiments? Far from it: but they had caſt off all fear of government, loſt all reſpect for its authority, conceived themſelves out of the reach of its power, and ſaw nothing to fear, but one another. As, without religion, the heart, ſo, without government, the conduct, of man, "is deſperately wicked:" nor is there, in nature, a more malignant and ferocious animal, than man unreſtrained by government. I cannot conceive a ſtate more wretched and deplorable, than a ſociety of men, without government. The ſolitary ſavage may ſecure himſelf from danger, by concealment; but man, in ſociety without government, can neither prevent nor eſcape it. Examine the hiſtory of people over whom government has not compleat control: what is it but a continued detail o

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cruelties and crimes; of theſts, rapes, rapine, and bloodſhed? In Europe, before civil government had attained ſyſtem and energy, to compel general ſubmiſſion to its authority, men fortified their houſes, as caſtles for defence againſt war. But, when government acquired force and reſpect, to control individual will, thoſe real fortifications were removed; the laws eſtabliſhed an ideal, but more effectual defence round every man, declared the perſon of every man ſacred, and his houſe an impregnable caſtle. A conſciouſneſs of ſafety in the force of government, and reſpect for its authority, ſoftened the manners of men, and humanized their minds. That cruelty and fierceneſs, which diſtinguiſhed them in the feudal conteſts, when the barons, unawed, and unprotected, by any ſuperior power, proſecuted, with deadly rancour, their mutual hoſtilities; gradually abated, as the authority and power of government increaſed. Safety produced comfort and good humour. Men, protected from each other, no longer ſaw each other as enemies, but as fellow citizens and brothers. Politeneſs, kindneſs, benevolence; and all the train of gentle affections took place of the rude and boiſterous paſſions, which had diſtorted their minds. The whole nation became as one family, knit together by their common reſpect for government. "Their ſwords were beaten into plough-ſhares;" manufactures, arts, and ſciences were cultivated, and the rational and moral faculties of man were exerciſed and improved. And then only did man begin to live according to his nature, when he ſubmitted his conduct to the reſtraints of government.

2. But government does not extend its reſtraints over all the actions of men. There are many things, which a ſubject of government may either do, or forbear.—And yet the doing, or forbearing of them may affect the happineſs of the ſociety. It may ſeem ſtrange, that government, whoſe end is to promote the happineſs of ſociety, ſhould not be ſo extended, as to embrace all its objects. Perhaps, however, it is more conſiſtent with the general ſyſtem of nature, to leave man, in many things, free from fear of immediate puniſhment, and permit motives of benevolence, generoſity, decency, and propriety, to produce voluntary, and, therefore, more meritorious effects in the conduct. Man is a free,

rational, and moral agent; and it is more honourable, to leave thoſe diſtinguiſhing powers to proper exerciſe, than to train man, by conſtant diſcipline and puniſhment, as the horſe or the ox, by the laſh or the goad. Government, therefore, confines its regulations to ſuch things as are eſſential, or moſt neceſſary for the ſociety, and, with reſpect to them, enforces the obligations which it impoſes. There are rights, which are called perfect; and rights, which are called imperfect. Perfect rights are poſitively enjoined, and enforced by a penalty. Imperfect rights have no penalty annexed to their violation. A man will be compelled to pay a debt: but government does not compel to do an act of generoſity or charity; to lead a life of exemplary induſtry or virtue; to cultivate the faculties of the mind, improve it in ſcience, and enlighten the world with knowledge; or to acquire manners and habits of politeneſs and ſtrict decency. Yet all theſe are uſeful to ſociety, and promote its happineſs; and are therefore duties incumbent on a rational and moral being. But although government, or the laws of the ſtate, enforce not thoſe duties or obligations; they are not, therefore, without law to enforce them, or motives to induce them. Opinion, or the law of ſociety, has a ſtrong influence on the human mind. The love of eſteem, reſpect, or reputation, is a powerful principle in our nature, and leads ſtrongly to ſubmiſſion to opinion, of the law of ſociety. The effects of a proper exertion of opinion, the law of ſociety, might be great and beneficial; and it is unfortunate, that they are not attentively conſidered, and ſteadily proſecuted. The great point is to get opinion on the ſide of virtue; to enforce, by its influence, uſeful ſtudies, arts, principles, practices, and manners; and to reprobate every principle or habit of a contrary tendency. This point is what the moral ſatyriſt, poet, eſſayiſt, orator, and preacher aims at. Without this, the beſt government will, in a great meaſure, fail of a compleat attainment of its end. If men do no more good, than what they may be compelled by the laws of the ſtate to do, they will as imperfectly promote the public proſperity, as a man promotes the proſperity of his family, when he labours no more, than is ſufficient to earn a bare ſubſiſtence, and keep them from ſtarving. This neceſſity compels: and by neceſſity, or by fear, any animal may be compelled, to

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perform, punctually, a prescribed task. For man, to do only this, is not elevating himself above the lower order of animals. To be a rational and moral being, he must do what is good and laudable, of his free will, from reflection and judgment, and a persuasion, that it is proper and useful, and from a sense of duty, independent of any positive law, or fixed penalty. And, to lead to this, there must, besides government, be also society, having opinion, as its law, with honour and shame, as its sanctions; and these, acting on a correspondent sense in the human mind, will produce the proper effects in the conduct, and supply the deficiency of coercive power in government. Thus, the influence of society, uniting with the force of government, the actions and manners of men are regulated. Government binds men together, by compulsion and fear.—Society binds men together, by sensibility, good will, mutual respect and interest, and by every generous principle of a rational and free agent. But the force of government, and the influence of society, united, can reach no farther than the actions and manners. To regulate the heart, there must also be religion.

3. It is inconsistent with that perfect arrangement of means and ends, in every thing that we can discern in nature, to believe that virtue, or a conduct most suitable to the nature of man, is not, on the whole, most conducive to happiness. To every course of life some inconveniencies are annexed; but an intelligent man will discern, a prudent man will pursue, and a good man will love, that course, which, on the whole, is the best; and that course, if nature be directed by wisdom, power, and goodness, must be virtue. Both by interest and duty, therefore, man must be directed to virtue; to seek the happiness of himself and his fellow men, to second the efforts of nature, in the production of good, to work together with God, as instruments in his hands, for his benevolent purposes, as parts of the creation, to fill up the chasm, between animal and celestial life, as stewards or servants, intrusted with the management of certain gifts and powers, for the exercise of which we are accountable, as free agents, and subjects of his moral government. But man is partly of a rational, partly of an animal nature; and each part draws him to different

objects. "The flesh lusteth against the spirit, and these are contrary, the one to the other." The authority of government, the influence of society, true interest, and a regard to duty, cannot, at all times, keep even the wisest and best men steady to that course of life, which all those motives point out. Something farther is yet necessary, to give the rational part of man a constant and decisive superiority; a wider range must be given to his hopes and fears, an unlimited scope to his imagination; scenes, beyond all that he can discern, must be disclosed, and another life opened to his view, compared with which, this life is but as a moment. All this is done by religion: aided by its motives, the spirit of man triumphs over his animal nature, opposes the force, and dispels the inchantment of passion; and rescued from its dominion, the mind of man, like a rational and moral being, is led by a sense of duty. To secure happiness and virtue, man must, besides government and society, have, also, religion. *June Sess.* 1795.

By religion, I do not mean that, which exhausts itself in prayers, fastings, or retirement. I say *exhausts* itself; because I will not disparage those means of virtue; but only warn against considering them as ends, or as religion itself. By religion, I mean, such a sense of GOD upon the mind, and such a belief of a future state, as produces a life of useful actions.

The foundation of all religion is the belief of a God. Unless an effect may be without a cause, unless the most intricate mechanism, with the most perfect adaptation of means and ends, infinitely exceeding our utmost conception, do not necessarily imply design, understanding, and power in its author; unless intelligence can be communicated to man, from a source without intelligence; there must be an author of nature infinitely wise and powerful. This, perhaps, would not be denied, if the vanity of man's heart did not lead him to seek also to know, what this author of nature is. And, because his limited mind cannot comprehend any thing capable of producing such effects, he disdains to believe, what he cannot explain. Infidelity, like credulity, is the offspring of ignorance and limited faculties. Had the natives of Jamaica, who, when they found, that Columbus had predicted an eclipse of the sun, believed him a

June Seff. 1795. God; been told by him, that, in Europe, water became hard, like a ſtone; they would have believed him a liar. The ignorance and weakneſs of man, ſetting up, for God, the vain phantoms of his own imagination, can extend to nothing correſponding to the boundleſs wiſdom and power manifeſted in the works of nature.—Therefore, rejecting his own idol as abſurd, and finding himſelf incapable of ſubſtituting any thing better in its place, the pride of his heart leads him to infidelity. Yet even this reſcues him not from his difficulty; and man, exerciſing his reaſon on the author of nature, is doomed to remain in a dilemma: for it is as impoſſible to comprehend, how the univerſe could have been made, and continued in exiſtence, without intelligence and power in its author, as to comprehend who, or what, its author is: and whether man believe, or diſbelieve, in a God, his mind muſt be bewildered, when it plunges into the contemplation of the origin of things. Philoſophers may "darken counſel, by words without knowledge; but they cannot, by ſearching, find out God." Some of the ſimpleſt operations of nature, it is altogether above our reach, to underſtand; yet our ſenſes compel us to admit their exiſtence. Is it then ſtrange, that we cannot comprehend the author of nature; or abſurd to believe, without comprehending? It is enough for us, that there is, in nature, a great productive power, arranging all things with infinite wiſdom, and, by inſtinct, reaſon, and the conſtitution of things, pointing out, to man and other animals a certain courſe of action, adapted to the nature of each; and that from this power, man, from his being affected by good or evil, is continually ſubject. This power, unleſs we can believe, that a power can communicate intelligence, without poſſeſſing it, we muſt believe to be intelligent. We muſt believe, alſo, that this power exerciſes a moral government over the world; unleſs we can believe, that a ſenſe of moral duty was given to man, without requiring that he ſhould exerciſe it. This incomprehenſible power, without ſeeking to underſtand what we name, we call God. When even the ſmalleſt things require care, direction, and government; ſhall the univerſe need no guide? If a houſe cannot be made without hands, had the world no Architect? If a ſingle family

muſt have a head, rules for its government, and foreſight and means, for its proviſion; ſhall the great family of nature be without protection? If diſſolution of government in the ſmalleſt ſtate, produce diſorder and crimes; ſhall we leave the whole creation to chance and accident, without wiſdom and governing power? Such a ſuppoſition accords not with that analogy of nature, which we perceive to exiſt in all things that can be ſubjected to our obſervation. From all that we know, we are led to believe, though it is above our reach of comprehenſion, that there is an Almighty power, which made and governs the world; and from that belief of this creating and governing power, religion, or a reſpect and ſubmiſſion to this author of nature, follows, as a thing of courſe. *June Seſſ.* 1795.

The belief of the immortality of the ſoul, as of the being of a God, becomes difficult, from the ignorance and pride of man. We will not believe, but where we underſtand: and the nature of ſpirit is altogether above our comprehenſion. So alſo is the nature of matter: we can judge of it only from its properties. Mind has properties alſo: it is ſomething that can think, feel, will, hope, fear, remember, &c. But as it cannot, like matter, be a ſubject of our external ſenſes, we need not wonder, that it ſhould be denied, when even the exiſtence of matter has been denied. Both can be known, only from their properties; and conſciouſneſs, the only evidence of the exiſtence of matter, equally proves the exiſtence of mind: and, it would ſeem, proves it more ſtrongly; for ſome, whoſe philoſophy led them to deny the exiſtence of matter, conſidered the exiſtence of mind as the only thing certain. Mind, incomprehenſible, in its nature, has been compared to the eye, which diſcerns every thing but itſelf. Admitting or rejecting the exiſtence of mind, or ſoul, the faculties of man are equally above our comprehenſion. It is not more difficult to comprehend, how ſoul may exiſt without body, than how ſoul can act upon body, or body act without ſoul. Some one of theſe caſes muſt exiſt; but whichever of them we chooſe, as the object of our belief, we muſt believe what we cannot comprehend. If ſoul can exiſt *without* body, it may exiſt *after* it: corruptibility is a property of matter;

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we know not, that it is a property of mind. Mind is the man; and independent of any one member or faculty, there is something, which every man calls himself: nor have we any satisfactory reason, from any thing that we can know, to conclude, that death, or the cessation of animal powers, extinguishes the powers of the mind. It would be, at least, as difficult, to prove, that it does, as that it does not: and he who denies the immortality of the soul, has, at least, as little ground for his opinion, as he who believes it. Experience informs us, that sleep may suspend, without destroying, the powers of the mind. May not death be only a change of the manner of exerting the faculties of mind. Such changes we discover in some animals. Such a change man himself undergoes, at his birth. In this life, the mind cannot exert all its faculties, without the present organs; and the destruction of some of the organs destroys the corresponding perceptions. Yet the mind remains, and can have other perceptions, by means of its remaining organs. After death, may not the mind act by other organs? And, when it has lost some of its present organs, can it not, by its faculty of reflection, memory, and conception, call up, as it were, the images of its past perceptions, or, by fancy or imagination, frame a world of its own? Cannot a man who has lost his sight, solace himself, by the recollection of a beautiful landscape, which he has once seen? Are there not many faculties, which the mind exerts, without any organ known to us? By what organ does it exert the faculty of memory, of reasoning, of fancy, of conception, of will, &c.? Point out the organ of the body, whose destruction, without death, would destroy those faculties of the mind.

The belief of the immortality of the soul is founded on reasoning and revelation, and has existed long in the world. Its rational foundation rests on the spiritual nature of man. Plato concludes, that man must be immortal, because a sense or expectation of immortality is impressed on his mind by the author of his nature, whence deceit, or any false impression could not proceed. On whatever foundation this belief rests, it is highly favourable to virtue and happiness; and it will appear, that Religion, as well as society and government is necessary to man.

It is ſo, on various grounds.

1. It adds new and powerful motives to thoſe principles in man, which are moſt ſtrongly oppoſed; the benevolent, rational, and moral principles. It adds vaſt energy to the ſenſe of duty. It places the ſtrongeſt barriers againſt the paſſions, by a ſenſe of the preſence of the author of our nature, and by the hopes and fears of a future and eternal exiſtence. And it furniſhes a ſweet cordial againſt the evils of life. Hope, that inexhauſtible ſource of happineſs, here finds ground for her anchor, when every thing elſe eludes her graſp.

2. Government and ſociety may reſtrain the actions and the manners, but cannot reach the heart, nor even the ſecret conduct, of man. Religion reſtrains, purifies, and improves the thoughts. Government and ſociety compel the concealment of faults. Religion promotes the cultivation of virtues. A man, without expoſing himſelf to the laws of government or ſociety, may ſtill be a hypocrite. To eſcape the laws of religion, he muſt be ſincere. A diſtinguiſhed nobleman, in a ſeries of letters to a ſon, ſeems to labour chiefly, to form his manners, and enforce, as an ultimate end, rather the neceſſity of being agreeable, than that of being good. But, when the heart is corrected, and the thoughts chaſtened, there is a greater ſecurity for virtue, than where only the conduct and manners are reſtrained.

3. Some ſtandard, preſumed above the power of man to alter, is neceſſary, to preſerve the principles and rules of government and ſociety, of political and moral duty, from corruption and perverſion; from being bent, according to the intereſt of thoſe who have the power of doing it. This ſtandard is religion; which dictating the belief of a ſupreme, intelligent, and moral governor of the world, reduces, before him, all powers and men to a level; all accountable to the author of nature, for their conduct towards each other; deduces a ſyſtem of fixed rules, unalterable by any human authority, and ſanctioned by the hope of divine favour, and the fear of divine vengeance. This is a law of a higher nature, than any other. From the relation of fellow citizens, to each other, is derived municipal law. From the relation of nations, to each other, is derived the law of nations. And from the relation of creatures to their

June Seff. 1795. God, and to each other, arifes this univerfal law of religion, which " confounds the wifdom of the wife, the power of the ftrong, the pride of the haughty, and the number of the many; introduces a new tribunal, before which all nations, powers and men, are equally accountable; prefcribes a fyftem of laws, which all are equally bound to obey; and denounces punifhments, which none can efcape. All civil and political authorities diffolve before this The law of nations may make the world one great republic; but it is a republic of nations or governments; every collection of men, called a nation or government, is an individual to every other; and no government or people has authority, to call any other government or people to an account, for any internal conduct. The moft degrading tyranny, or the moft licentious anarchy, or the utmoft profligacy of manners and principles, may prevail; domeftic flavery, or general idlenefs, may extend over a whole people, and the law of nations gives no other people any power, to correct or reftrain them. But this univerfal law of religion " breaks down the partition walls," which divide each people from every other; confiders all nations, and the authorities and individuals in each, as one great family or republic of individuals, all equally fubject to the government of the author of nature, and equally and mutually bound to the relative duties of each. Societies may agree to a general corruption of morals, and that, in this degeneracy, each individual fhall keep all others in countenance. Nations may agree to pervert the principles of their government. What fhall reftrain them? Religion: the laws of which are an univerfal conftitution, inviolable by any individual, fociety, or government; by the principles of which the conduct of each may be compared; and with which, according as the conduct of each correfponds or difagrees, it is lawful or unlawful. Does not this introduce new obligations and motives to virtue, and additional fecurity for happinefs?

There may be men out of the reach of the laws of government and fociety. True, this cannot be, but where power and wealth are very unequally diftributed. In a democratic government, no man is out of the reach of the laws. And, in a ftate of fociety, where wealth is not diftributed very difproportionately, few men can

be out of the influence of public opinion. This form of government, and this ſtate of ſociety, are, therefore, the moſt favourable to virtue. When men, from the ſtate of their circumſtances, or the temper of their minds, deſpiſe the opinion of the world, even when on the ſide of virtue; ſociety has no reſtraint on them. Shame, infamy, exceſſive wealth, or a ſelfiſh miſanthrophical diſpoſition, tend to this; and tend, therefore, to the prejudice of virtue and happineſs. To regulate the hearts, the manners, and where they are not regulated by government, the actions of ſuch, they muſt have religion. Religion is alſo neceſſary, to reſtrain thoſe over whom government has no reſtraint. What can reſtrain the injuſtice of a deſpot? Religion. In the moſt deſpotic countries of Aſia, where there is no political authority to reſtrain the prince, he dare not tranſgreſs the rules of religion applied to caſes of a civil nature. "Admitting, therefore," ſays a profound writer, * "that it were uſeleſs, for ſubjects to have religion, it is neceſſary, that princes have it; as the only curb, which thoſe, who fear not human laws, can have. A prince, who loves religion, and fears it, is a lion, that yields to the hand which ſtrokes him, or the voice which ſoothes him: a prince, who fears religion, and hates it, is like a wild beaſt, that bites the chain which reſtrains him from darting on thoſe who paſs by: a prince, who has no religion, is like a terrible animal, that never feels his liberty, but when he tears in pieces and devours." Religion therefore is the only barrier againſt the power of a deſpot, or of all thoſe who, in any ſtate of ſociety, or under any form of government, cannot be controlled by the laws of the ſociety or the ſtate. Something like this ſubſiſted in the antient mythology. Even Jupiter, the king of the gods, had his omnipotence reſtrained by the decrees preſcribed in the book of fate. So ſtrongly is the ſenſe of a general ſuperintending law impreſſed on the human mind, that fable muſt adopt it, as part of its machinery.

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The preceding obſervations on the importance of government, ſociety, and religion, may ſuggeſt ſome uſeful inſtruction. For every good man, who believes

* *L'Eſprit de loix, xxiv. 2.*

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them, as they have been ſtated, to be eſſential to human virtue and happineſs, muſt feel himſelf ſtrongly bound to reſpect and ſupport them.

1. The man, who ſeriouſly reflects on the neceſſity and value of government, as what alone can ſecure to us the benefits of ſociety, the improvement of our rational nature, and the enjoyment of ſafety and peace; will learn how important it is, to cheriſh a reſpect, and obſerve and enforce a conſtant ſubmiſſion to its authority. The obligation of this duty is increaſed, in proportion to the extent of the baſis, on which government is founded. I have already obſerved, that, by government, is meant the laws: for officers are but machines, which muſt move as the laws direct. In a government like ours, where the laws are the will of the whole people; the obligation of reſpect and ſubmiſſion to them, is the ſtrongeſt that can be conceived. What government will we obey, if we obey not that, which is founded on our own will? Where the people have no power in making the laws, there may be a neceſſity, that public contempt and cenſure ſhould oppoſe injuſtice and oppreſſion in the laws. But where there is a conſtitution, ſetting bounds to the authority of the legiſlature; a judiciary, which can annul an unconſtitutional law, frequent and general elections, when the people, by changing their repreſentatives, can change the laws which they diſlike; the evils of any law muſt be but ſhort lived; the remedy is always near at hand; and, ſuppoſing a temporary inconvenience, it is not ſufficient inducement, to riſk the peace of the ſtate, by foſtering a diſreſpect, which ignorant, raſh, and violent men may pervert to an oppoſition, to the laws, which may weaken the force, and deſtroy the benefit of government, and introduce confuſion and anarchy. This perhaps was not ſufficiently diſcerned and conſidered, till an unfortunate experience taught us its importance. It is peculiarly incumbent, therefore, on citizens of a democratic republic, to hold the laws in veneration, and whether acceptable or diſagreeable, treat them with a ſacred reſpect and obedience. No law ought to be ſuffered to lie inactive and dormant: all ought to be carried into execution. If laws be improper, let the will of the people, legiſlatively expreſſed, expunge them

from the code, or correct their inconvenience: but while they have the ſanction of legiſlative authority, they ought to be exerted. If any law be treated with diſreſpect, or rendered inactive, by the opinion of ſome individual, neighbourhood or ſociety; the authority of government is debaſed; the way is opened for general diſreſpect and neglect of all laws; private will, and not general will, governs; and the laws of ſociety controul and defeat the laws of the ſtate. This is dangerous, and tends to the deſtruction of government: However unfaſhionable or unpopular a law may be, while it exiſts, it ought to be conſtantly reſpected, exerted, and obeyed: if it be not, the exiſtence of all laws, and all government, becomes precarious. *June Seſſ.* 1795.

I will give an inſtance, where faſhion, or public opinion, the law of ſociety, ſeems to have rendered a law of the ſtate, in great meaſure, inactive. There has long ſubſiſted in Pennſylvania, a law "for the prevention of vice and immorality." I am not now called upon, to defend the principles of that law, or to enquire, whether the legiſlature have, or have not, in it (as is ſometimes done) *legiſlated too much*; or whether it would, or would not, be more prudent to leave many points of this kind to the voluntary exertion of a ſenſe of decency and duty, and to the laws of ſociety and religion. The only light in which I am to view it now, is as a law; and, as ſuch, whether it be a good, or a bad law, it ought to be reſpected, exerted, and obeyed: for the example of the neglect of it plainly tends to the neglect of every law; and neglect naturally producing diſobedience, tends, therefore, to the deſtruction of the government, which reſts on reſpect and obedience to the laws.

2. When we conſider the prodigious influence, which faſhion, public opinion, or the law of ſociety, has over the conduct of men, we muſt be ſtruck with the important uſe, which might be made of this influence, in favour of virtue and happineſs. The man, who, ſelfiſhly and moroſely, diſcovers and inculcates a contempt of public opinion, removes one of the ſtrongeſt ſupports and motives of virtue and uſefulneſs. And the moraliſt, who can perſuade mankind to ſet faſhion and public opinion on the ſide of virtue; to beſtow reſpect only on

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good and uſeful actions, and contempt always on fooliſh and wicked actions; and to enforce, by the laws of ſociety, reſpect to the laws of government and religion, will do the moſt important ſervice to human virtue and happineſs, that they have ever received, ſince the promulgation of the goſpel. Let us purſue this principle, and give countenance and reſpect only to virtue, to uſeful actions, to obedience to the laws of God and of the ſtate. Let us not diſregard, but reſpect, public opinion; and guide its application, as a motive and a reward of an uſeful life, and a check and puniſhment of folly, wickedneſs, and diſregard of civil duty.

3. The man who reflects on the ſalutary maxims of religion, the weight of its ſanctions, and its mighty force, in improving the hearts and lives of men; will acknowledge, if the arguments, for and againſt it, were but equal, that it would be an office becoming wiſdom and philoſophy, inſtead of weakening the obligations of religion, to direct its authority, to aid the opinions of ſociety, and the laws of the ſtate, in producing obedience and a regard to duty, in making good men, and good citizens. Cheriſh religion; cheriſh all the means of impreſſing on the minds of men, a ſenſe of God, and of a future ſtate. No principle whatever will operate more powerfully in producing uſefulneſs and virtue, in making good members of ſociety, and good ſubjects of the laws. It arms the ſenſe of duty with the moſt important influence, and dictates a regard to all the duties of private, ſocial, and civil life, "not only for wrath, but for conſcience ſake." Such is the tendency of all its principles, maxims, and rules. This wiſdom from above is pure, peaceable, gentle, and full of good fruits.* "Whatſoever ye would, that men ſhould do to you, do ye even ſo to them; for this is the law and the prophets.† Let every ſoul be ſubject to the higher powers: for there is no power, but of God. The powers, that be, are ordained of God. Whoſoever therefore reſiſteth the power, reſiſteth the ordinance of God, and they that reſiſt ſhall receive to themſelves damnation."‡

* *James iii.* 15—17. † *Matth. vii.* 12.
‡ *Rom. xiii.* 1—2.

4. We may reflect generally on the great conſequence to virtue and happineſs, that the laws of government, of ſociety, and of religion, be not ſeparated; but that they unite and concur in their operations on the ſentiments, manners, and conduct of men. The joint efforts of religion, ſociety, and government, might produce important improvements on the human heart and life. But if their efforts be ſeparated, or ſet in oppoſition to each other, they weaken or deſtroy one another, leave no ſenſe of duty on the mind, and prepare men for every irregularity. What horrible crimes have been perpetrated, under an opinion of doing God good ſervice! And how much ſtronger would be the obligation and inducement, to perform all the duties of men and citizens, to obey the laws of ſociety and the ſtate; if men conſtantly bore in mind, that "ſuch is the will of God"! Thoſe three laws, of God, of the ſociety, and of the ſtate, have a mutual dependance on each other. Leſſening the obligations of one leſſens the obligations of both the others alſo. That man cannot be truly religious, who diſregards either the laws of the ſtate, or the rational opinion of ſociety. That man cannot be a good member of ſociety, who diſregards either the laws of the ſtate, or of God. And that man cannot be a good citizen, who diſregards either the laws of God, or of the ſociety. The breach of any one of theſe laws is a violation of duty; and to deſerve a good character, we muſt reſpect all. *June Seſſ.* 1795.

I think it a tribute of praiſe due to the two preſbyteries in theſe counties, to add here, that the application of theſe principles has been made, with great propriety, in their late reſolutions, to refuſe (without ſatisfactory evidence of repentance) the diſtinguiſhing privileges in their church, to all perſons, who, during the late diſturbances, had an active hand, in burning property, robbing the mail, and deſtroying the official papers of the officers of government; in their declaration of hearty diſapprobation of all riotous, illegal, and unconſtitutional combinations againſt the government, the laws, or the officers of government; and in their earneſt recommendation and injunction, to all people under their care to be ſubject to all magiſtrates, and lawful authori-

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ty.* This direction of the ſanctions of the church, to promote the peace of ſociety, and ſubmiſſion to the laws of the ſtate, is a co-operation of eccleſiaſtical with civil authority, and a ſpecimen of the uſeful practical purpoſes of religious principles, that muſt receive the approbation of every man of virtue and ſenſe, and, I hope, will be exhibited by the other churches. For they muſt all ſee, that the motives to ſubmiſſion to lawful authority, muſt be greatly ſtrengthened, if, without that, men find, that they will be cut off from every church. And to ſtrengthen the motives to ſubmiſſion to lawful authority, all churches muſt perceive to be their duty; ſince it is a dictate of religion, that "every ſoul, for conſcience ſake, and to avoid damnation, be ſubject to the powers that be, as to the ordinance of God."

* *See Pittſburgh Gazette of 9th May*, 1795.

No. XV.

Virtue the principle of a Democratic Republic. The neceſſity of virtue in the people, eſpecially in Elections.

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THAT virtue is the principle of a republican government, has obtained the authority of a maxim. And it has been ſtated, and ſome pains have been taken to ſhew, that a republican government is the moſt favourable to virtue.* I need not here repeat, that, by virtue, I do not mean any abſtract ſpeculative notion, or external formality, as counting beads, or wearing ſack cloth: I mean an honeſt, wiſe, and diligent exertion of our talents for general good.

Virtue can have effect only in proportion to its power. In any other, than a republican form of go-

* *This (except a few paragraphs) was written next after No. XI, and intended for September Seſſions*, 1794, *but not then delivered; the inſurrection requiring attention to the tranſactions of that period.*

vernment, virtue in the people can have but little or no effect: for their power is little or none. In other governments, virtue muſt be confined to domeſtic, or nearly relative duties, ſocial or friendly acts of benevolence. In other forms of government it is public power, which alone can effect public good. In a democratic republic, to produce public good, there muſt be public virtue in the whole people: for in the hands of the whole people is the authority and force of the nation really veſted. *Sept. Seſſ.* 1795.

Without virtue in the people, the benefit ariſing from a democratic government altogether vaniſhes. If, breaking through the ſtrong motives to virtue, which accompany this form of government, the people loſe ſight of public good, and ſuffer themſelves to be corrupted by ſelfiſh paſſions, and baſe views; all the wretchedneſs of tyranny is united with the reflection, that they are, themſelves, the authors of their own miſery. And, ſince the government becomes equally miſchievous, as any of the worſt form, its beneficial nature can neither remove the ſhame, nor alleviate the guilt, that they have become the tyrants of themſelves, and the ſlaves of their own vices. If virtue is extinguiſhed, if the public force is not directed to the public good, if every individual, regardleſs of the common intereſt, purſues a ſelfiſh and ſeparate end; and the exertions of all, inſtead of co-operating for general proſperity, contend for private and diſcordant gain, individual exertions mutually defeat each other; the activity of all is inefficacious or corrupt; the liberty of the government exiſts only in theory and form; for, in reality and effect, all the baneful fruits of oppreſſion are produced; and, whatever ſubſequent changes this beſt form of government may undergo, the actual condition of the people will hardly be injured, and may poſſibly be improved. For the power of government might better be in the hands of one, who might, at leaſt be partial towards all, and reſtrain the miſchief of every one but himſelf.

Indeed, when the people have loſt their virtue, a democratic form of government, will not long ſubſiſt. When they have formed other views, and begun to

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purſue other ends, than the public good; the vaſt variety, and incongruous nature of the intereſts proſecuted, will open their eyes to the danger of each. Thoſe, whoſe intereſts are moſt nearly the ſame, will unite in ſeparate factions, for their own defence. *Divide and govern*, the maxim of every tyrant, will be the principle of every faction towards every other. Some one faction, by numbers, accident, or cunning, will become predominant over the reſt; the nature of the government will, in fact be changed into ariſtocratic oppreſſion; and an ariſtocratic form of government will ſoon acquire the public ſanction. Similar diſſentions, among the individuals of the ariſtocracy, will, in time, caſt a predominancy into the hands of ſome one of them: and a tyranny of one will be eſtabliſhed.

In other governments, though the people ceaſe to be virtuous, the government may be preſerved: becauſe there is a controuling power, independent of the people, which can preſerve the authority of the laws, and make them be obeyed, though they ſhould be hated. But, in a democracy, when virtue is loſt, the government is loſt. To preſerve the ſpirit of the government, in its adminiſtration, its officers muſt ſee, that the people maintain a conſtant care and love of it. The adminiſtration of the government is the execution of the laws. The object of the laws is public good. When the people loſe their love of public good, they loſe their love of the laws, which are the means of promoting it, and the force of the laws is broken; for the force of the laws is in the people's love of them. If the people hate the laws, or view them with indifference; or if the laws oppoſe the inclinations of the people, public officers, dependent on the people, will not execute them: and the laws will become a dead letter. Without virtue, the people will not bend to the laws: the laws will bend to the people. The natural ſupport of the laws, virtue in the people, thus failing, the laws fall. The laws are the government. When the laws fall, the government falls: and, ſince it has loſt its uſe, become incapable of enforcing the proſecution of public good, it ought to fall. Some military or intriguing uſurper, or political faction, ſoftered and conducted by the corruptions, oppreſſing the weakneſs, or flattering

the vices, of the people, will ſeize the vacant throne of the laws; and, with the deſtruction of the government, reſtore a force, that will ſubdue the paſſions of men, reſtrain individual violence, and bend the will of all to the governing power. The people, no longer fit to be citizens, become ſubjects, perhaps ſlaves. *Sept. Seſſ.* 1795.

Such is the natural progreſs of a democracy, where the people have loſt their virtue, abandoned the deſire and purſuit of public good.

If, in a republic, the want of virtue in the people deſtroys the beneficial nature of the government, and ſoon changes its form; it is not without reaſon, that virtue is conſidered as the principle of a republican government. Indeed, from the ſlighteſt attention to the nature of a democratic government, it will reſult, rather as a ſelf-evident truth, than as an aſſertion requiring any illuſtration, that, without virtue, in the people, a democracy can produce no happy effects. Whatever be the form of the government, if the ruling power be deſtitute of a deſire, to promote the general good, the government muſt be bad; for its force will not be directed to any uſeful end. In a democracy the people is the ruling power; and if the people be deſtitute of a deſire to promote the public good, or, in other words, be deſtitute of virtue, even this government, which, of all governments, is the moſt favourable to happineſs, muſt be bad. If virtue can be made the principle of the ruling power, it is of little practical importance, where this power reſides. Even deſpotiſm, of all governments, the leaſt favourable to general good, has been conſidered as capable, in the hands of a virtuous prince, of producing the moſt happineſs; for here virtue has no reſtraint on its exertions. But as there is no certainty of guarding, even a virtuous prince, from corruption, and yet leſs, of ſecuring a ſucceſſion of virtuous princes; a nation, careful of its own happineſs, will not, unleſs experience declare its neceſſity, chooſe this form of government. Prudence, viewing the fallible conſtitution of man, requires that duty be conſtantly combined with intereſt; that power be given to thoſe, who have the leaſt inducement to abuſe it; and that authority, over the condition of all, be exerciſed by all. From theſe principles, reſults the propriety of preferring, to all others, a democratic republic.

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But if, in a democratic republic, the people have loſt their virtue, the ruling power has become deſtitute of a deſire to promote the public good; this ground of preference to any other form of government (and the only ground of preference, which it poſſeſſes) ceaſes to exiſt; and this government becomes as deſtructive to happineſs, as any other. Each individual, inſtead of contributing to increaſe the ſum of public proſperity, ſtrives to filch, from the general maſs, as much as he can, and convert it to his private enjoyment. The natural object of the ſociety, mutual protection, is perverted into a ſyſtem of mutual plunder. The nation, inſtead of a band of patriots, united for common aid, becomes a gang of pilferers and robbers, without union or confidence, plundering their fellows, and the world. All principle and right is ſacrificed to ſelfiſh paſſion. The whole people become depraved, without any controling power, to reſtrain them, the miſery, produced by this form of government, equals, in magnitude, that, which the worſt tyranny can produce; and is the more hopeleſs, as there remains no proſpect, that it can be removed or mitigated: for, one generation tranſmitting its manners to another, the people never die, and hardly ever reform, but by ſome terrible calamity, or violent diſſolution of the whole frame.

The object of a democratic government being the equal defence of all, to ſecure to every man the natural and juſt effects of his own faculties; ſuperior advantages can only be conferred on ſuperior virtues; on thoſe whoſe talents, diſpoſition, and conduct, eminently promote utility. When the people are virtuous, their virtue will neceſſarily produce this effect; for this effect is neceſſary for public good. Then every man is ſafe in the poſſeſſion of his juſt ſhare of property and influence; and the happineſs of all is beſt ſecured. But if virtue is baniſhed from the people, if they ceaſe to know, love, and purſue the public good, every man ſtrives, by all poſſible means, to ſecure to himſelf the utmoſt portion of public advantage. Equality and juſtice, a diſtribution of advantages according to uſeful faculties, is no longer regarded. No man aſks, what is uſeful to all, but only what is uſeful to himſelf. The whole manifeſts, not a diſintereſted exertion of uſeful powers, but

a baſe ſcramble for offices and gain. Superior advantages are no longer the reward of the honeſt and the uſeful; but the prey of the cunning and the rapacious. Talents and integrity diſappear from public ſtations; and they are filled by deceit and rapine. Authority is exerciſed by the ignorant, the baſe, and the unprincipled; and the powers of government are no longer directed to the public good, but to a wild variety of private ends, and plans of miſchief. *Sept. Seſſ.* 1795.

The difference is perhaps leſs felt, between a good and a bad *form* of government, than between a good and a bad *adminiſtration* of the ſame form. A poet of high reputation conſiders forms of government, and modes of faith, as matters of indifference, and a good adminiſtration, and a good life, as the real objects of importance. Beſtow but a little reflection on the ſtate of a democracy exerciſed by a virtuous people, and the ſtate of a democracy exerciſed by a people without virtue; and the effects of each appear vaſtly different. In the firſt, every man enjoys ſafely all that he can acquire, by uſeful means; in the laſt, every man enjoys all that he can acquire by the moſt baneful ſpeculation. In the one, a man riſes to reſpect, by an honeſt and diligent uſe of profitable talents; in the other, he acquires influence, by diſſimulation, baſeneſs, and iniquity. In the one, to ſerve yourſelf, you muſt ſerve the public; in the other, you may beſt ſerve yourſelf by cheating the whole. In the one, the hands of all are combined, to ſupport virtue, and to ſuppreſs vice; in the other, the virtuous man can find no friends or aſſociates, and the knave is always ſure of partners and patrons of his ſchemes. In the one, there is no danger, but every encouragement, to integrity and uſefulneſs; in the other, fraud and corruption have nothing to fear, and public ſpirit nothing to hope. Wiſdom directs the whole power of the one nation, to general good; cunning directs every mind in the other, to private gain, at the riſk of public calamity. The one nation reſembles a company of merchants, united for mutual benefit, each receiving advantage, in proportion to his ſtock and labours; the other is a captured city, given up to indiſcriminate pillage.

Attached, as we juſtly are, to a democratic govern-

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ment, we are diſpoſed to view with ſurpriſe, a nation having this form in its option, and chooſing another. But if an ill adminiſtration of this favourite form be not leſs pernicious to public proſperity and happineſs, than the worſt form of government; may we not, with equal ſurpriſe, view our own conduct, if, in the adminiſtration of our democracy, we are not actuated by virtue. If, in fact, our government produce not its proper effect, general good; it can neither diminiſh our diſgrace, nor add to our conſolation, that the fault is not in the form, but in the adminiſtration of our government; and that, without hazarding an experiment, in a change of our form of government, we can remove the miſchief, by changing only our own conduct and manners.

If poſſeſſing as we do, the beſt form of government, we ſee it, in any reſpect, fail in the accompliſhment of its genuine object, public proſperity; the fault is in the people; for with them is the power. Let the man who complains of any meaſure of adminiſtration, conſult his own breaſt, whether he is not chargeable with ſome of the blame. Has he, in appointing to office, or in any public duty, contributed nothing to the general corruption? Has he been influenced only by virtue? Or has he been governed by partiality or ſelfiſhneſs? And what effect was his conduct calculated to have on the conduct of others? In governments, over which the people have no influence, it is uſeleſs for individuals, to examine the progreſs of political tranſactions, or the conduct of themſelves and others in public duties. But for the citizens of a democracy, in whoſe hands, either directly or indirectly, all power reſides, to be indifferent to public tranſactions, is a neglect of duty, and a diſregard of liberty. Nor is it leſs cenſurable, to ſuffer their examination of public meaſures, to expire, in the gratification of curioſity, and the acquiſition of knowledge. Can the citizen be leſs guilty, who neglects to reform the errors, which he ſees; than he, who neglects to ſee the errors, which exiſt? Our knowledge of public conduct ought, therefore, to regulate our conduct, as citizens; it ought to lead us, to reward, with eſteem and appointment, thoſe men, whoſe conduct has deſerved our confidence, and to puniſh, with neglect, and

removal from office, thoſe men, who have deceived our hopes. *Sept. Seſſ.* 1795.

As the citizens, by the delegation of their powers to officers, wave not their right to examine and animadvert on the manner, in which this power is exerciſed, ſo the officer, in accepting this delegation, waves not his right of a citizen, to examine and animadvert on the conduct of other officers and citizens. Though a citizen, in becoming an officer, remains ſtill a citizen, his new capacity ſubjects him to an additional ſcrutiny. No citizen ought to accept an office, if he want either virtue or competent talents. If a citizen is conſcious to himſelf, that his faculties are inadequate to the duties of the office; or that he wants induſtry, to apply his faculties to the full exerciſe of the authority veſted in him; or that he wants ſpirit or inclination, to exert the authority of the office, to its true conſtitutional extent and effects, and render it productive of as much public good, as its lawful extent will admit; or that he ſeeks the office, for his own intereſt only, without an honeſt and reaſonable view of being uſeful in it; by accepting an office, he commits a crime againſt his country, corrupts the adminiſtration of the government, and merits the diſapprobation and reſentment of his fellow citizens.

Speaking with a view to government, virtue in the people, ſince they cannot exerciſe the powers of government themſelves, is chiefly uſeful, in producing virtue in their officers. But, whatever be the excellence of virtue in the people, it ceaſes to be uſeful, even in a democracy, ſince the authority muſt be exerciſed by officers, if theſe officers are not virtuous, that is are not, in their ſtations, deſirous, capable, and diligent, to promote public good.

I know nothing more detrimental to the virtue of officers, than a diſpoſition in the people to be pleaſed with flattery. The powers of an office are general rules, the application of which muſt therefore occaſionally give offence. The ſituation, humour, and paſſions of men, being various and changing, the exerciſe of a public office, will, of thoſe on whom it operates, be diſagreeable, *always* to ſome, and *often*, to many. Officers are therefore ſeduced, by a love of what is called popu-

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larity, to give that kind of flattery to the people, which of all others, is the moſt acceptable, in accommodating their conduct to the humour of the day, or the ſolicitation of the applicant. Thus the true end of the office, *ſerving* the public is perverted into a falſe end, *pleaſing* the public; the duty of the office is betrayed; the conſtitutional end of the office is defeated; the general rules of office are broken down; and the law might as well have left the officer, without any inſtruction or limitation of power, confident, that he would always chooſe, to do what was pleaſing, in order to ſecure his continuance in authority.

Let the people change their temper, and officers muſt change theirs. Let them tell officers, "we deſire you to do what is *right*; and we ſhall deſpiſe you, if your ſtudy is to do what is *pleaſing*. We are not to be flattered with little arts, ſtudied aſſiduity, and temporary compliances. The popularity thus acquired is ſhort and contemptible. Chooſe a right line of conduct; this will, in the end be approved."

Let then the people deſpiſe flattery, and flattering arts. In a democracy, if the people be virtuous, they will always find their officers virtuous, or make them ſo: and if the people be corrupt, their officers will be corrupt alſo. The ſtream will be like its ſource. The ſap, that riſes from the root, will work its way to the topmoſt leaf. If there be virtue in the people, it will run through all the branches of government. If the people be corrupt, corruption will defile every channel of adminiſtration. If you would, therefore, make your government excellent in practice, as it is in theory, preſerve and enforce the love and purſuit of public good.

Above all, let the people reflect on the importance of that authority, which they exerciſe; and let them act with the dignity and independence, which its importance requires. At other times, they exerciſe the ſovereignty by agents; but there is one day in the year, the day of general election, when they aſſume the ſovereignty in perſon. Then, eſpecially, they ought to ſcorn every mean motive and unworthy art; and, with a ſpirit becoming the rank they occupy, diveſting themſelves of every private and ſelfiſh end, and liſtening only to the

voice of patriotiſm and virtue, like ſo many Alexanders, give their votes to the moſt worthy. *Sept. Seſſ.* 1795.

To the curſe and calamity of this country, there has long prevailed among us a ſet of people, known by the name of *electioneering men*, whoſe conduct, the whole year round, is conſtantly governed, by the proſpect of influence on the day of the election. This might be fair, and might be laudable, if their motives, for the purſuit of popularity, were honeſt; if their addreſſes were made to the underſtanding and intereſts of the people; and if they uſed their influence, to direct the people to virtue, and to promote the public good. But when we ſee, that their motives are ſelfiſh, their ends private gain, or perſonal revenge; or their means popular deluſion, by ignorant or diſhoneſt and deſtructive practiſing on the paſſions and prejudices of their fellow citizens; in what light can we view them, but as fiends, who ſeduce, that they may deſtroy, or raiſe a ſtorm, that they may ride in it; or as robbers, who ſet fire to a houſe, that they may plunder it; or, "as a mad-man, who caſteth firebrands, arrows, and death, and ſaith, am I not in ſport?" *

For ſome years, this has been purſued a ſyſtem.—Whenever one of theſe men wiſhes to bring into office himſelf or his friend, or turn out his enemy, or to puſh himſelf forward to public notice, and become of conſequence, or to accompliſh any other ſelfiſh or unworthy purpoſe, he ſtirs up a complaint of ſome public grievance, or lays hold of ſome popular ſubject of diſcontent. To extend his influence, and attain his purpoſe, he gathers to himſelf others of like ſentiments and views, or dupes to his art, or tools to his deſigns. And, to add to their opinions and projects the influence of numbers, and the ſhew of unanimity, meetings, committees, or ſocieties, are held and eſtabliſhed.

I mean not to queſtion the privilege of any individual, freely and fairly to diſcuſs any political meaſure. I mean not to join in the indiſcriminate cenſure of all combinations and ſocieties. Mutual information and mutual aſſiſtance are ſocial duties. I mean not, for it would be preſumptuous, to diſpute the right of citizens,

* *Prov. xviii. 26.*

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Those who have argued against all associations, have stated, with some plausibility, this objection to them.— "They establish a consideration of interest, separate from that of the general interest of the nation; and a connection and attachment between the members, separate from that which arises from their being of the same state. So that in choosing men for offices, the minds of the members are not free, but under the bias of this subordinate attachment; and against a candidate, who is of the society, a candidate of equal worth, not of the society, will have no chance for the votes of the members of the society; and, by the members of the society, a candidate of less worth, in the society, will be preferred to a candidate of greater worth, out of the society; the attachment of the society overbalancing the superiority of worth. Thus, so far as the influence of the members can extend, a monopoly of offices is possessed by the society, and a sort of aristocracy is established in the society: each member of it possessing more influence, as a member, than he would possess, in his individual capacity of a citizen."

This subordinate attachment, to fellow members, seems to pervade all societies. There have been times, in which a man could hardly be elected into an office, in some counties, unless he were a Quaker, in other counties, unless he were a Presbyterian: in some counties, the officers must all be of German, in others, all of Irish extraction. In some counties certain family connections sway every election. And, in almost every county, skilful *electioneering men* court the influence of

the different intereſts, more or leſs, according to their ſtrength, by naming certain of their members for offices. Let us lay aſide all theſe petty diſtinctions, and narrow affections, and regard each other only as citizens. *Sept. Seſſ.* 1795.

But waving the conſideration, that combinations eſtabliſh an undue influence on the minds of the members; may we not fear that they eſtabliſh an undue influence on the minds of others? May we not fear, that the opinions of the ſociety have more weight, than the individual uncombined opinions of all its members; and that the opinion of only ſome of its members, and thoſe, perhaps, the leaſt worthy, acquires the weight of the opinion of the ſociety? And is not this the more to be regretted, when we conſider, how thoſe meetings are often compoſed?

For, when there is no authority requiring attendance on thoſe meetings, or aſſociations, it often happens, that *many* of the moſt modeſt, *many* of the moſt honeſt, *many* of the moſt ſenſible, and *many* of the beſt informed, of the citizens, do not attend them. *All* the pragmatical, intriguing, vain, conceited, and *popularity-hunting* men, do attend them. The moſt ambitious, and the moſt violent, take the lead. Even by falſehood and error, confidently and publicly declared, the modeſt may be ſilenced, and the weak convinced, and the uninformed may be perſuaded, that it is the general opinion. The voice of thoſe meetings is called the voice of the people; and their authors and leaders become the patriots of the day, the darlings of the people, the oracles of political wiſdom, and the ſucceſsful candidates or recommenders for office.

We had an unhappy inſtance of this in the late inſurrection. A ſet of muſhroom patriots, whoſe voice had never before been heard, nor influence felt, ſprung up at once, and became candidates, or ſupporters of candidates, for office. With nothing to recommend them, but ignorance, impudence, and violence; by ſeizing the prejudices, and working on the paſſions of the people, they acquired all the influence of virtue, wiſdom, and patriotiſm. And, at the criſis, when this country ſtood on the brink of deſtruction, when the awful queſtion of war or ſubmiſſion was agitated: thoſe men, againſt the

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moſt palpable conviction, at the hazard of general ruin, and from no other motive, but to maintain their influence at the approaching election, laboured, with a diabolical induſtry and perſeverance, to keep up the prejudices and the paſſions of the people. Though their exertions had not all the miſchievous conſequences, to have been apprehended from them, they, unhappily, prevailed ſo far, as to prevent that evidence of general ſubmiſſion, which government required, and brought an army into this country.

May the exiſtence of all ſuch men be ſhort, as of the gourd of Jonah. As they come up in a night, may they periſh in a night. Let all ſuch men, and all improper motives and means of acquiring popularity, and all inſidious approaches to office and appointment, be guarded againſt, diſcountenanced, and ſuppreſſed. Let contempt and deteſtation be the reward of thoſe, who ſeek popularity, by ſeiſing the temporary paſſions of the people. Let integrity, wiſdom, and a firm purſuit of public good, without reſpect to popularity, be the only means of influence or ſucceſs in elections. The exerciſe of a conſtitutional right, and conſcientious duty, is too important to be proſtituted to the deceitful practices of unworthy men.

Who, with the leaſt ſpark of public ſpirit in his breaſt, can think, without indignation, on the many baſe acts, which have diſgraced our elections, contaminated the ſource of our adminiſtration, and ſtained our character as citizens? The man, who can gain a vote, by a contrived falſehood, a deceitful trick, or an impoſition on the ignorant or unwary, boaſts of his ſucceſs, as a laudable ſpecimen of dexterity; and is heard or detected, with as little diſguſt, as if he cheated at a gambling table, a horſe race, or a jockeying match. Thoſe, who have no right to vote, are impoſed on the inſpectors; a voter will vote ſeveral times, or give in ſeveral tickets at once; and ſtrange to tell! even the election officers, forgetting their oath, and their ſacred truſt, will become principals or accomplices in frauds: and theſe deteſtable violations of public virtue, like the lying miracles of a falſe religion, will receive a palliating name. So deſpicable is our meanneſs, that we think it no affront to our honour and dignity as electors, if the candidates for

office appear on the election ground, with ſpiritous liquors, as the beſt evidence of their merit, and ſolicit our votes, by ſeducing us to intoxication. How can we expect, that our officers ſhould regard our intereſts, when, in our own hands, we treat them with ſo little reſpect? Shall we any longer wonder at the corruption of foreign governments, or the waſte, which kings make of the rights of their people, when we, exerciſing our own rights, proſtitute them to ſuch pollutions?—Where ſhall liberty, where ſhall virtue, fly for refuge when in a democracy, they are thus trodden under foot! *Sept. Seſſ.* 1795.

If any remnants of thoſe ſacred names be yet left among us; if their influence has not altogether abandoned us; let us call them back; let us rouſe from our depravity, and obliterate our ſhame.

Lately, I have often regretted, that the conſtitution has eſtabliſhed election by ballot; ſince this mode is more liable to fraud, than the open manner of voting *viva voce*; and the equal diſtribution of property among us is ſufficient to ſecure independence in voters. But, as this remedy cannot now be applied to, let us ſeek out, for our election officers, men who entertain a ſenſe of the importance of the duty, and poſſeſs hearts above the reach of corruption, and heads above the reach of deceit. And let us all come forward to elections, under this ſolemn impreſſion, that we are about to exerciſe a public truſt of a ſovereign nature, and exert an act of judicial authority; and that, in the diſcharge of this public duty, we are bound, in honour and conſcience, to act for the public good, without any view to private affections or ends, no leſs ſtrongly, than if we were bound by oath.

What! you will ſay, is not the right of voting our privilege, and may we not uſe it, as we pleaſe? The right of voting is our privilege, and we may uſe it, as we pleaſe: but, for the uſe of it, we are accountable, to our conſcience, our country, and our God. Our liberty of voting is like our liberty of acting on other important occaſions: we are free to vote improperly, as we are free to act ſo, as to be hanged here, and damned hereafter.

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Let all private paſſions, intereſt, affection, or enmity, therefore, be laid aſide: blind to every thing, but the public good, we ſhould conſider ourſelves as diveſted of all ſentiments, as men, and act only as citizens on public duty.

In ſelecting the men, whom we are to honour with our votes, let us remember, that integrity, talents, and public ſpirit, muſt be united. Without public ſpirit, to induce exertion, talents and integrity, wanting a ſpur to excite them, will be inactive; and the officer will be indolent and uſeleſs. In chooſing men of ignorance or weakneſs, however honeſt; we but furniſh tools, for knaves to work with. In my experience of the world, I have doubted, whether more miſchief has not been done, by folly, than by villainy, and whether the blunders of the one are not more to be feared, than the frauds of the other. Place a man of ſenſe, though without honeſty, in a public ſtation, and ſelf intereſt, a fear of detection, may reſtrain his vices. But I know no reſtraint for the folly of fools. I ſhall not be underſtood, as giving any ſanction to the choice of unprincipled men; but only cautioning againſt conſidering honeſty as a recommendation of weakneſs.

With talents, honeſty, induſtry, and public ſpirit, the candidate for office ought to poſſeſs firmneſs and independence. Unawed by opinion, he muſt have courage to do his duty, and to ſhrink from no reſponſibility annexed to his ſtation. Thoſe political weathercocks, who tremble at every breeze, and point always to the fluttering gale of popularity, are unworthy of confidence, and ought to be conſtantly rejected from office. Mark the man, whoſe conſtant aim is to pleaſe, and truſt him not; for he will ſurely deceive you, when he can do it without diſcovery. Mark alſo the man, whoſe aim, without reſpect to pleaſing, is to be uſeful; for him you may truſt.

Let us put out of faſhion the practice of candidates running about the country, ſoliciting votes and intereſt for their election. Strongly ſuſpicious, that he has in view ſomething elſe than public good, let us never vote for a man, who deſcends to do this. And let us mark, with ſure and conſtant reprobation, the candidate, who pollutes the election ground, with liquors and entertainments.

Diſtruſt the candidate, who accoſts you with ſmiles and flattery. Avoid him, who induſtriouſly throws himſelf in your way, and ſeeks occaſion to learn your ſentiments, reſpecting his election, and conciliate your good will to his ſucceſs. The independent honeſt man, whoſe true wiſh is to ſerve the public, will feel, that his fellow citizens, if they chooſe him for their confidence, will ſeek him out, and that it is not ſufficiently reſpectful, to ſolicit for himſelf. *Sept. Seſſ.* 1795.

Caſt off, with diſdain, thoſe *hangers-on*, who purſue your ſteps on the election day, to watch your conduct, and influence your mind. And reject thoſe buſy meddlers, who pry into your tickets, or endeavour to preſs your votes into their ſervice.

Remember, that, in elections, you are acting a part of ſovereign authority, are exerciſing an important truſt over your own rights, and are bound, by the moſt ſacred ties, to do it impartially, for the public good. Remember alſo, that not only your own intereſt and honour, but the intereſt and honour of democracy in general is deeply concerned. For if the people themſelves, having the power of election in their hands, fill offices with ignorant or unworthy men, do they not proclaim to the world, that the principles of democracy are not worth contending for; and that it is the intereſt of all nations, to be content with whatever government, they may happen to have, ſince a change, on the moſt popular principles, is no ſecurity for a good adminiſtration.—When I think of the baſe, the ignorant, and the worthleſs men, who have ſought and received from the people, appointments to offices of the higheſt importance; I bluſh for our character as a people, and ſigh for the cauſe of liberty.

Perhaps theſe obſervations may be unkindly conſidered as impertinent deviations from my line of duty, and may be called inſolent dictating, in matters which do not concern me. They do concern me, for every citizen is concerned in the vote of every other, which, though not under his controul, as much affects his intereſt, as his own vote; and no citizen, by becoming an officer, loſes any privilege of a citizen. Though no officer has a right to employ his official ſituation, to gratify his own

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private views"; yet the officer, who confines himſelf to the ſtrict duties of his ſtation, ſeems to me to be leſs uſeful, than he who ſeizes theſe opportunities, which his ſtation affords him, to do good actions, or communicate good advice. On this account, I have the conſolation to know, however theſe ſuggeſtions may be received, that they proceed from no ſelfiſh motive, and are directed to no private end. They proceed from an honeſt reſpect for the principles of our government, and a ſincere deſire, that its proſperity, be promoted.

No. XVI.

Nature and Modification of a Repreſentative democracy.

March Seſſions. 1796.

A WRITER, who, in a remarkable degree, poſſeſſes the faculty of placing common ſubjects in a new light, inſtead of the uſual arrangement of governments, reduces them to two, a government by repreſentation, and a government by hereditary ſucceſſion. Some would diſtinguiſh a democracy, in which the people themſelves make the laws, from a democracy in which the people chooſe repreſentatives, to make the laws, by calling the laſt a republic. But this name is given to governments, which have but little in them of the democratic principle, and partake more or leſs of the other principles of government. It is given to the government of Venice, and to the former government of Holland. Even Poland, before the revolution of 1791, though it had a king, was called a republic. As I do not, therefore think, that the name *republic* ſufficiently characteriſes the genius or principles of the government, neither do I think, that the principle of repreſentation ſo changes the genius of democracy, as to render it improper to ſay, that a government, in which the people chooſe repreſentatives, to make laws, is a democracy. I think it a democracy, though not an immediate one. Without pretending to critical propriety in the diſtinc-

tion, I would ſay, that it is a *mere democracy*, when all the people aſſemble perſonally, to exerciſe all the powers of government; an *immediate democracy*, when the people themſelves aſſemble to make laws; and a *repreſentative democracy*, when the people aſſemble only to elect repreſentatives, who are to make and execute the laws. I conceive, the principle of repreſentation, may be more or leſs complex, without changing the principle, but only the form, of democracy; and the government is democratic, if the people appoint thoſe, who are to exerciſe, or to ſubſtitute thoſe who ſhall exerciſe the public authority. *March Seſſ.* 1796.

I therefore call the government, both ſtate and federal, under which we live, a democracy; becauſe the people chooſe thoſe perſons, who exerciſe, or who appoint officers to exerciſe all legiſlative and executive authority. This authority is exerciſed under preſcribed rules, as to its extent and duration, and, at periods, reverts to new delegations from the people. So that, immediately or ultimately, all power is in the people; and wherever it is ſo, there is democracy.

A mere or immediate democracy can exiſt only among a very few perſons, and within very narrow bounds. Even a congregation, a townſhip, or a borough, find the immediate exerciſe of public authority inconvenient or impracticable, and delegate more or leſs of their power, to agents or officers. To convene the whole people of a county, to deliberate and confer together on every, or on any, ſubject; and to collect the general will, would be, at leaſt, a matter of great difficulty. But to convene for this purpoſe, the whole people of a ſtate, or of the United States, is as abſurd in ſuppoſition, as it would be impoſſible in practice. What then is to be done, by a numerous and extended people, living under one government? They muſt chooſe repreſentatives or agents, in whom they have confidence, to deliberate, determine, and act for them.

On principle, every repreſentative or agent, elected by the citizens, ought to be elected by all the citizens within the juriſdiction, for which he is appointed. The authority of the preſident of the United States extends over all the States; it is, therefore, properly preſcribed,

March Seſſ. 1796. that he ſhall be appointed by electors, choſen by the citizens of all the States. As the vote of any one member of congreſs may affect every citizen of the United States, and the vote of any one member of aſſembly may affect every citizen of this ſtate; it would follow, on the ſame principle, that every citizen of the United States ought to have a vote in the election of every member of congreſs, and every citizen of this ſtate ought to have a vote in the election of every member of aſſembly.

To an imperfect being, like man, no perfect ſyſtem can be adapted; and every principle, however admirable in the abſtract, muſt be modified in the practice, according to the ſubject to which it is applied; and muſt be followed, only ſo far as it can be uſefully and ſafely followed. In the caſe of the preſident of the United States, the principle is ſufficiently practicable. There is but one repreſentative or public agent to be choſen, and, of ſeveral perſons conſpicuous throughout the United States, there may be, as there now is, one, who, more than any other, will unite the votes of all the citizens and electors. But to ſay, that every citizen in this county ſhall vote for every member of aſſembly from the county of Philadelphia, or that every citizen of Georgia ſhall vote for every member of congreſs from New-Hampſhire, would be ridiculous. That the repreſentative or agent poſſeſs, as he ought to poſſeſs, the confidence of thoſe who appoint him, the power of election ought to be accompanied with the means of information. For it is juſt as rational, to throw up dice for repreſentatives, as to vote for thoſe, to whoſe character we are ſtrangers. The limits of election ought, therefore, not to exceed the limits of information; that every man may be reaſonably informed, reſpecting every repreſentative for whom he votes. Where the juriſdiction is extenſive, and the repreſentatives to be choſen are numerous, this becomes impoſſible, unleſs each citizen were to chooſe all the repreſentatives within the circle of his own information. But a repreſentation of this kind would be precarious, and would never produce general confidence. The principle, therefore, becoming impracticable, dangerous, or uſeleſs, muſt be controuled by convenience, and adapted to its ſubject. The uſual modification of it,

and the modification adopted in our government, is, to divide the extent of jurisdiction into districts, giving a power to the citizens of each district, to choose such a number of the representatives, as bears the same proportion to the whole number of representatives, that the number of the citizens of the district bears to the whole number of citizens. Thus the whole Union is divided into states, and each state into counties. The citizens of each county choose its proportion of members of assembly; and the citizens of each state choose its proportion of members of congress. Though the members of congress chosen in each state be far less numerous, than the members of assembly chosen therein; yet a state may be so extensive, and its members of congress so numerous, that each citizen may not have reasonable means of information to enable him to vote, with judgment, for every member of congress, to be chosen, within it. In this state, therefore (and in many other states) with a view to the election of members of congress, there is another distribution into districts composed of counties; and the citizens of each district vote for such a number of members of congress, as bears the same proportion to the whole number of members of congress chosen in the state, that the number of citizens in the district bears to the whole number of citizens in the state. *March Sess.* 1796.

This modification of the principle is accompanied with some practical evils. When the limits of election are narrow, improper persons, who neither possess nor deserve general confidence, presuming on their popularity in their own neighbourhood, set themselves up as candidates for duties, which they cannot fulfil; and the electors too often sacrifice the public interest to the shameless solicitations of such candidates. If candidates had modesty enough, to seek only such offices, as they are qualified to fill; and if citizens had virtue enough, to choose only such persons, as are qualified for the offices to be filled, this evil might be removed.

Another evil, which results from this modification of the principle, in having a representative chosen by only a district of the jurisdiction, by a part only of those who are affected by his authority, is a misapprehension of the relation of representative and constituent. The representative is apt to consider himself as the agent of that

March Sess. 1796. district alone, which elected him; and the citizens of that district consider themselves as his only constituents. Hence, instead of extending his desire and endeavours, to promote the wishes and interests of all within the jurisdiction, it too often happens, that he confines his views to that district only, in which he was chosen.—And the citizens of that district, instead of viewing him as bound to consult the will and the interest of all the citizens within the jurisdiction; too often expect, that he should consult only their will and interest. This is a false sentiment. That a member of assembly, having power to vote for a law to bind every citizen in this state, should be chosen by the citizens of this county only; or that a member of congress, having power to vote for a law to bind all the citizens of the United States, should be chosen by the citizens of this state only; is, on principle, altogether wrong, and is admitted only from the necessity of a practicable election.—But this necessity ceasing with the election of the member, the violation of principle ought to cease also; and immediately after his election, the member ought to consider himself as the representative of all the citizens on whom his vote can operate, and bound to consult the will and interest of all within the jurisdiction. It is a mean and narrow view of himself, that a member of assembly takes, when he considers the citizens of that county alone, which elected him, as his only constituents; and it is a mean and narrow view of himself, that a member of congress takes, when he considers the citizens of that state alone, which elected him, as his only constituents. Such views of relation and duty cramp the efforts and talents of representatives, and produce a selfish, partial, and jarring system of legislation. Every member of assembly ought to study and promote the interest of the whole state, and every member of congress ought to study and promote the interest of the whole Union. For it surely is a principle, that duty ought to be co-extensive with authority. A representative, chosen by a particular district, is as much a representative of the whole jurisdiction, as an arbitrator, chosen by one of the parties, is the arbitrator of all the parties. The representative, like the arbitrator, by whomsoever chosen, is vested with a controul over the

whole ſubject ſubmitted to him, and bound, not to favor thoſe who appointed him, but to do right to all, who may be affected by his deciſion. And it is by this general ſcale, that the conduct of every repreſentative ought to be meaſured. *March Seſſ.* 1796.

But the ſame narrow viewof this relation of conſtituent and repreſentative, which occaſions errors in the repreſentative, frequently alſo occaſions complaints and cenſure among the conſtituents. A repreſentative is charged with having oppoſed the will or the intereſt of his conſtituents, when he has only oppoſed the will or the intereſt of the county, diſtrict, or ſtate, which elected him; and perhaps has cloſely, honeſtly, and wiſely, purſued and promoted the general will of the ſtate or the Union. If he has done this, every honeſt and intelligent citizen will ſay, that he has done his duty, and deſerves praiſe and confidence.

A delicate queſtion may here be ſuppoſed, reſpecting the duty of a repreſentative. Is it merely miniſterial, or is it judicial or diſcretionary? Is he bound by the will of his conſtituents, or is he not?

In which ever way this queſtion is to be anſwered, another muſt firſt be attended to: how is he to know the will of his conſtituents? I conſider it as ſettled and certain, that the conſtituents of each repreſentative are all the citizens within the juriſdiction, for which he is appointed. The conſtituents of each member of aſſembly, therefore, are all the citizens of this ſtate; and the conſtituents of each member of congreſs are all the citizens of the United States. The difficulty then, which preſents itſelf, of every repreſentative knowing the will of his conſtituents, is great, if not inſuperable. How ſhall a member of congreſs diſcover truely the will of the whole maſs of the citizens of the United States? Is he to learn it from the prevailing opinion of the ſociety or neighbourhood, in which he lives? This is taking the will of but a very ſmall part of his conſtituents, and narrowing the limits of his duty far within the limits of his authority. In an extended country, with varied intereſts, opinions muſt differ in almoſt every neighbourhood; and hardly may any one be ſafely taken as a juſt ſtandard of the general opinion. Is he to learn it from paragraphs and eſſays in the news-

March Seſſ. 1796. papers? Theſe are often the whims of the ſingular, the reveries of the ſpeculative, or the reflections of the ignorant; and perhaps not the opinions of even their authors. Is he to take it from the reſolutions of ſocieties and town-meetings? Theſe are ſometimes the work of the factious, the preſumptuous, and the ſelfiſh; and are no certain criterion of the general will of the people.

Paſſing from the difficulty of a repreſentative aſcertaining the will of his conſtituents, let us conſider its obligation on his deliberations and deciſions. Is he bound to a ſtrict conformity to it? He has an important deliberative duty aſſigned to him, which he ought to diſcharge to the beſt of his knowledge and judgment. It would ſeem, therefore, that his own mind ought to be ſatisfied of the propriety of his determinations; and that it is not ſufficient, that he act mechanically and from impulſe. The great, if not inſuperable, difficulty of aſcertaining the true will of his conſtituents muſt neceſſarily leave a great deal to his own judgment and conſcientious diſcretion. If even he were ſure, that he had aſcertained the true will of his conſtituents; how can he be ſure, that they poſſeſſed the information neceſſary to form a right opinion on the ſubject, and that they would not think differently, if they poſſeſſed all the information, that he poſſeſſed? Without any expreſs obligation on the repreſentative, his conſtituents have a ſufficient ſecurity, that he will conſult their true will and intereſt, from his dependence on their good opinion. And beſides the general authority delegated to him, to deliberate and determine for them, he has an individual authority and intereſt of his own, as a citizen, which they cannot transfer or controul.

Theſe conſiderations have great weight. But, as repreſentation is an epitome or abſtract of the people, for the purpoſe of aſcertaining the general will; I conceive it to be the duty of the repreſentative, if he can aſcertain the general will of his conſtituents, to act, in his repreſentative capacity, as, ſuppoſing them to poſſeſs all the information that he poſſeſſes, and to act honeſtly and wiſely, he believes they would act, if they were to act perſonally. In this manner, the will of the people is made known, and the government is a repreſentative democracy.

1. From the nature of a repreſentative democracy, it ſeems to follow, that the only way in which the will of the people can be known is through their repreſentatives. The adoption of the principle of repreſentation proves, that this is the only way in which the will of the people can be truely and rightly declared; and the power of election ſeems to ſecure, from their repreſentatives, a juſt declaration of the will of the people. It ſeems to me impoſſible, that a repreſentation founded on ſo extended a baſis, as the repreſentation in our government, ſhould ſpeak any thing but the will of the people. Is there any man, or number of men, better qualified, or more intereſted, to ſpeak the will of the people, than repreſentatives choſen by the people, for that purpoſe, and dependent on the people, for being continued in their appointment? If they would retain their appointment, they muſt look to the approbation of the people; if their appointment ceaſe, they become part of the people, and muſt be governed by their own laws. Their intereſt is the ſame, with that of their conſtituents; and repreſentation ſuppoſes, that the repreſentatives are the beſt organs of the will of the people. *March Seſſ.* 1796.

2. In a repreſentative democracy, when we ſpeak of the people, we mean all the citizens, in their aggregate, collective, or corporate capacity. A political, like a commercial, aſſociation, may conſiſt of many members, but they are all one body. The citizens are many, but they are one people; and, as a people, can have but one will, expreſſed by their repreſentatives. There is no other way but this, of expreſſing the will of the people. *The people* is the corporate name of the political body, and means a different number of citizens, according to the ſubject. If the ſubject relates only to a townſhip, it means all the citizens of that townſhip; if to a county, all the citizens of that county; if to a ſtate, all the citizens of that ſtate; and if to the Union, all the citizens of the Union. When we obſerve, therefore, men in converſations, in newſpapers, in ſocieties, or in town-meetings, affect to ſpeak the will of the people, we muſt conſider this as meaning no more, than the will of thoſe citizens, who ſpeak or aſſent to it; and whether theirs be the will of the people, may be known, by comparing them, with all the citizens concerned in the ſubject;

March Seſſ. 1796. whether it relate to a townſhip, a county, a ſtate, or the Union. No man can ſpeak for another, without authority; and no man, but their repreſentatives, has authority to ſpeak for the people. And an attentive obſerver will find, that the will of the people is more faithfully and truely declared by the legitimate repreſentatives and agents of the people, than by any number of unauthoriſed individuals.

3. In a repreſentative democracy, every public officer, deriving his appointment, mediately, or immediately, from the people, and his authority from their will expreſſed in their conſtitution and laws, is a repreſentative or agent of the people, as to all things, to which his authority extends.

4. When we reflect, that in a repreſentative democracy, the agents or repreſentatives of the people are the legitimate organs of the people, and that the will of thoſe agents is the conſtitutional will of the people; when we reflect, that the public agents or repreſentatives are choſen by the people, are dependent on them for their authority, and have themſelves a perſonal intereſt in the welfare of the whole community; when we reflect on the vaſt number of citizens of which the people is compoſed, the great variety of opinions, that muſt exiſt among them, and the impoſſibility of their uniting in one ſentiment; when we reflect on the almoſt unſurmountable difficulty of aſcertaining the general will of the people, the improbability, that any one individual or neighbourhood can competently judge of it, and the better opportunity, which the public agent or repreſentative has of information, reſpecting both the public will, and the public intereſt; when together with the perſonal intereſt and public dependence of the agent or repreſentative of the people, we reflect on that regard to reputation, which a public ſtation tends to inſpire; we ſhall be perſuaded, that a confidence in the conduct of public agents and repreſentatives will beſt promote the peace, happineſs, and proſperity of the people, and beſt preſerve the purity of the government; that groundleſs jealouſy of the agents or repreſentatives of the people has a tendency to drive honeſt, able, and diſintereſted men of ſenſibility, from public ſtations, and leave them to be filled by the ignorant, the ſelfiſh, the diſſem-

bling, and the ſhameleſs, to introduce a fickle and diſ- *March Seſſ.*
cordant ſyſtem of meaſures, and to pervert the nature of 1796.
the government. Examine, with jealouſy, the conduct
of every candidate for office, and never appoint, but
where you can confide. But appointment is a pledge
of confidence, and the officer or repreſentative has a
right to expect, that it ſhould be continued to him, till
he has forfeited his claim to it, by certain miſconduct,
or ill intention. A conſtant regard to the public good,
a careful and conſcientious choice, of public officers, and
a reaſonable confidence in them, when choſen, are the
life and nouriſhment of a repreſentative democracy.—
And experience will ſhew, that ſuſpicion, diſtruſt, or
groundleſs jealouſy, is the canker, which will eat out
the principles of democracy, introduce ſelfiſhneſs and
corruption, deſtroy all ſtability and uniformity of public
meaſures, defeat the ends, and pervert the principles, of
a government by repreſentation, and render another and
leſs free ſyſtem neceſſary to ſecure the benefits of ſociety.

You and we, gentlemen, are now veſted with autho-
rity from the people of this ſtate, to exerciſe a public
truſt, in which each of us has a particular duty. We
have a right to receive from our fellow citizens, and we
ought to give to each other, the confidence due to men
veſted with ſuch authority. Let us proceed to our ſeve-
ral duties, with that prudence, integrity, and ſpirit,
which our preſent ſtation, as public agents, demands,
and with that mutual reſpect, which ſuch principles
ought to inſpire.

No. XVII.

Delivered (together with No. VII.) to the Grand Jury of Allegheny County.

Abuſe of Fairs.

June Seſſions. 1796.

YOU have probably ſeen an advertiſement, in the gazette, and in printed handbills, of a fair to be held in this place, at this time. This, though not ſtrictly regular, is, I preſume, under that part of the law incorporating the borough of Pittſburgh, which authoriſes fairs. Such clauſes are common in borough corporation laws, and are ſervilely copied from Europe. In Britain, a fair or market is held by grant or patent from the crown. In imitation of this, an authority for holding fairs is given here, among other privileges or authorities, to boroughs, when they are incorporated by law. In Europe, a fair or market is for the purpoſe of trade, buying and ſelling. Vaſt quantities of merchandize and manufactures, as well as horſes and other cattle, are brought to fairs for ſale. Great part of the buying and ſelling of many things, and almoſt the whole of ſome things, is tranſacted at fairs. Debts are made payable at fairs. And theſe are occaſions, on which people expect to find thoſe, with whom they have buſineſs to tranſact. So that, in Europe, fairs are eſtabliſhed and conducted for uſeful purpoſes.

The only fair I have ſeen in this country is that which was held here laſt June, as now, during the court. An unuſual number of idle people were aſſembled, ſtrolling through the town, from tavern to tavern, drinking, dancing, and exerting themſelves to be noiſy. Horſe races were exhibited and repeated from day to day. Indeed, ſome people ſeem to conſider a horſe race, and a fair, as the ſame thing. From that ſpecimen of a fair, I am diſpoſed to think, that, in this country, a fair is another word for a nuſance; and I think it ought to be conſidered as ſuch; and the promoters of it, as promoters of diſturbance of the peace. To collect together a number of people, on an occaſion, and in a ſitua-

tion, in which moſt of the reſtraints of decorum, and many of decency, are caſt off, and where number, promiſcuous intercourſe, and mutual example, promote the violation of any little decorum or decency, which may remain, has ſurely a tendency to produce offences, and, in my eye, is not innocent. To do this too, at a time not preſcribed by law, when the conſtituted authorities, and the citizens in general, are occupied with the adminiſtration of juſtice, ſeems to be an aggravation of the offence. As fairs are held here, they are not neceſſary, they are clearly uſeleſs, they are probably dangerous, and, in my opinion, they are real evils, and ought to be avoided and aboliſhed. *June Seſſ.* 1796.

In the advertiſement of the fair, at this time, in order to excite the curioſity of the ignorant, and draw out the idle and the worthleſs, there is an intimation of horſe races, and of rope-dancing by ſome vagrants, who collecting wealth from the folly of fools, and aſſembling crouds for idleneſs and miſchief, may be ranked, with gamblers and ſharpers, as the blood-ſuckers and corrupters of ſociety.

Were there no act of aſſembly (as there is) forbidding it, to gallop a horſe, in a town, has ſo plain a tendency to miſchief, that it is ſurely an offence. I am diſpoſed to think, that idly and wantonly doing ſo, on a public road, where people travel, ought to be conſidered in the ſame light. If, therefore, any horſe races ſhould be attempted in this town, or, I would alſo add, on a public road, I think it the duty of every magiſtrate, to have the perſons concerned apprehended, to anſwer for their miſdemeanor. By an act of aſſembly, horſe racing for bets, or wagers, or prizes, of money or any other thing of value, is puniſhable with a fine. To this circumſtance, it will alſo be the duty of every magiſtrate to attend.

Your duty, gentlemen, on this occaſion, will be, while you continue to ſit, to watch over the laws, and the peace of this county; and, wherever you find any violation of them, make a preſentment of it, that the guilty may be puniſhed. Enforce, by your example and authority, decency of manners as one of the beſt preſervatives of virtue.

June Seſſ. 1796. If you go farther, and, to prevent all occaſions of the like kind here for the future, unite in a petition to the legiſlature, to repeal, as uſeleſs and dangerous, that part of the law incorporating Pittſburgh, which authorizes fairs; I think you will have the approbation of all the thinking, ſenſible, and good citizens of this borough.

No. XVIII.

Diſtribution of the Sovereignty in a Conſtitutional Government.

September Seſſions. 1796. IN every independent nation, whatever be the form of its government, there exiſts, ſomewhere, a ſovereignty or ſupreme power, which, it is ſaid, reſides wherever the power of making laws is placed. It is, therefore ſaid, that ſovereignty and legiſlature are convertible terms, and that one cannot ſubſiſt without the other: for, wherever the power of making laws reſides, all others muſt conform to it, and be directed by it; and it is, at any time, in the option of the legiſlature to alter the form and adminiſtration of the government, by a new rule.*

As Blackſtone, the diſtinguiſhed author whoſe ſentiments I quote, had in view the delineation of the Britiſh government; it is probable, that thoſe ſentiments ſprung from that view. Accordingly, he conſiders the ſovereignty as lodged in the Britiſh parliament, compoſed of king, lords, and commons; and to parliament he aſcribes abſolute and deſpotic power; power to alter the ſucceſſion to the crown, the eſtabliſhed religion, or even the conſtitution of the kingdom and parliament; in ſhort, power, uncontrolled by any authority upon earth, to do every thing not naturally impoſſible.†

Vattel, while, ſuppoſing an attempt of the two houſes of parliament, to veſt the king with abſolute power, he

* 1 *Comm.* 46, 49.

† *Ib.* 50, 160.—*but ſee ib.* 41. 91. *Heb.* 87.

aſſerts, that the nation has a right to oppoſe it, admits, that ſilence in the nation would be conſidered as an approbation of the act of its repreſentatives. But, in laying down general rules, he, on better principles, denies, that the legiſlature has any authority to change the conſtitution, or fundamental laws.* *Sept. Seſſ.* 1796.

Locke admits, that, while the government ſubſiſts, the legiſlature is the ſupreme power; but conſidering the legiſlative power as only a truſt, for attaining the public good, he holds, that when the legiſlative is altered, as where any branch of the government, not authoriſed for that purpoſe, takes on itſelf to make or annul laws; or when the legiſlative acts contrary to its truſt, as where it violates the indefeaſible rights of the ſubjects; the government is diſſolved; the delegation of the people, the foundation of all authority, is gone, force only, without authority, remains, reſiſtance becomes lawful, and all its conſequences are chargeable to the uſurper, not to the reſiſter of uſurpation, and the people have a right to remove, or alter the legiſlative. "And thus the community may be ſaid, in this reſpect, to be always the ſupreme power, but not as conſidered under any form of government, becauſe this power of the people can never take place, till the government be diſſolved.†"

Theſe ſentiments of Locke, however juſt in theory, yet, as tending to anarchy, and the annihilation of all law, Blackſtone conſiders as improper, for practical adoption, in any ſyſtem of government.‡

The opinion of Blackſtone, reſpecting the omnipotence of the Britiſh parliament, muſt be formed upon this ground, that, in Britain, there are no fundamental laws eſtabliſhed by any higher or other authority than parliament itſelf; and that, of courſe, the power which made, may alter. The opinions of Vattel and Locke proceed on a ſuppoſition, that there are fundamental laws, reſtraining the authority of the legiſlature, and ſubject only to the authority of the community or nation. The diſtinction, then, is between a nation which

* *Law of Nations*, B 1, c. 1. § 32, 34.
† *Eſſay on Government*, B. II. c. 13. §149, 150, c. 19.
‡ 1. *Comm.* 52, 161.

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has a conſtitution, and a nation which has none. Where there is a conſtitution, the legiſlature has a qualified ſovereignty; and a power to do any thing not forbidden by the conſtitution. Where there is no conſtitution, there is, of courſe, no conſtituted authority to reſtrain the legiſlature, and it poſſeſſes ſovereignty, or ſupreme power. So is the ſovereignty exerciſed, while the government continues in a ſettled ſtate. But there reſts always, in the whole nation or people, a power to take on themſelves the ſovereignty, and to change the conſtitution or the legiſlature. But this power, from the delicacy and danger of its aſſumption, Blackſtone heſitates to admit, contemplate, or define.

The ſtates of America have expreſs fundamental laws, or written conſtitutions, which declare the ſource, and the power of alteration, of government to be in the people; recogniſe certain indefeaſible rights in the citizens, and preſcribe limits to the different branches of their governments. The conſtitution of Pennſylvania expreſſly aſcertains thoſe articles.

If by ſovereignty be meant ſupreme power, by this muſt be meant ſupreme law or authority; and if ſovereignty and legiſlature be convertible terms, and there be degrees of legiſlature, ſovereignty muſt reſide in that legiſlative, which has authority to make ſupreme law. Where there are fundamental laws, or a conſtitution, the ſovereignty cannot reſide in the ordinary legiſlature; for this legiſlature has not power to alter the conſtitution; therefore it has not ſovereignty or ſupreme power. The conſtitution controuls the ordinary legiſlature, and is a law paramount to any law that can be made by this legiſlature. But the conſtitution itſelf may be altered by the nation or people. The nation or people, therefore is the ſupreme legiſlative, and the will of the nation, expreſſed in the conſtitution, is the ſupreme law. Thus, the conſtitution is the ſovereignty; and, as the nation or people have the power of declaring it, the ſovereign power may be ſaid to reſide with the nation or people.

But this ſovereign power in the people is never exerciſed by them, when the government is in a ſettled ſtate. This ſovereignty in the nation or people, is, I will ſay, a ſovereignty in the laſt reſort, a right in remainder or reverſion. The ſovereignty is their eſtate or right, the

exercise or enjoyment of which they have parted with, on certain terms, and transferred to agents, delegates, or representatives. This devesting and transfer of sovereignty has, in the states of America, usually been made by transferring to a convention of delegates, a power to establish a constitution or fundamental laws, in which the sovereignty of the nation is to be deposited, and which shall prescribe the forms and limitations under which the constitution shall be administered, and the sovereignty of the nation exercised or enjoyed. By submitting to this constitution, the people devest themselves of all authority, not therein reserved to them, and transfer it to this constitution and its administration. Revolution ceasing, government succeeds. The people no longer exercise the sovereignty themselves, but give it up to the constitution and according to its limitations, to their agents, delegates, or representatives under it. The people may change this constitution; but, while they permit it to subsist, they acknowledge its authority, and have no right to resist its dictates, nor oppose the constitutional acts of any branch of its administration. They are bound by their own act, and subjects to their own will, the constitution. *Sept. Sess.* 1796.

Under a settled government, therefore, with a constitution, and while it subsists, the sovereignty or supreme power is in the constitution. It is not in the legislature, nor in any other branch of the government: for the legislature, and all the branches of the government, are mutually controuled by each other, all subject to the constitution, and unable to effect any thing contrary to it. It is not in the people; for, until they annul, they cannot contradict any part of the constitution, or its lawful administration. Different portions of power are distributed, by the constitution, to the different branches of its administration; and the administration of those powers may be considered as the exercise of portions of the sovereignty. In the nation, or the whole people, resides a revolutionary sovereignty, a power, on general consultation, to annul the constitution, and change the whole frame of the government. And this, being the highest act of authority, may, strictly, be considered as the sovereignty.

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The different portions of ſovereignty, diſtributed, by our conſtitutions, into different branches, may be named the legiſlative, or power to make laws; the judiciary, or power to interpret and apply laws; the executive, or power to execute laws; and the elective, or power to appoint to office. The firſt is in the hands of the legiſlature; the ſecond in the hands of the judges or courts; the third in the hands of one or more magiſtrates ſupreme and ſubordinate; and the laſt is in the hands of the people, or of the other branches of the government. The whole compoſe the adminiſtration of the conſtitution, and, in their ſeveral functions, each may be conſidered as a diſtinct branch of the government, veſted with a diſtinct portion of the ſovereignty.

In England, the king is conſidered as the ſource of all power, he calls the parliament his; and, at the opening of every new parliament, the ſpeaker of the houſe of commons demands of the king freedom of ſpeech. But our political ſyſtem is founded on no ſuch preſumption of ſuperiority, in any branch of our government; but on a preſumption of equality in every branch. The legiſlature is not the ſovereign; for it is ſubject to the conſtitution, and, according to the conſtitution, controuled by the other branches: the executive may reſiſt, and the judiciary may annul, any unconſtitutional act of the legiſlature. The executive is not the ſovereign; for it is ſubject to the conſtitution, and to the conſtitutional acts of the legiſlature. So is the judiciary; and ſo is the elective branch. The conſtitution is the ſovereignty, and every branch of the adminiſtration is the ſubject of the conſtitution; but every branch of the adminiſtration, as agent of the conſtitution or the ſovereignty, is, with reſpect to every other, equal and independent, in the exerciſe of the portion of ſovereignty committed to its adminiſtration. Within its limitation of power, no branch can be controuled by the others. But the authority of each is limited, and beyond its limitation no branch can act. The legiſlature can make no law contrary to the principles of the conſtitution. The judiciary is bound to give judgment according to law. The executive cannot exceed the authority given it, by the conſtitution, or an act of the legiſlature, or of the judiciary. Nor can the people, nor any branch of the go-

vernment appoint to any office, a perſon legally diſqua- *Sept. Seſſ.* lified to fill it. Thus the conſtitution, and the authority 1796. derived under it, controuls and bounds all. When any branch of the government does an act, which it has authority to do, the act is valid, and every other branch is bound by it. When any branch of the government does an act, which it has not authority to do, the act is void, and no obedience is due to it. When any branch of the government is engaged in the exerciſe of its authority, it is to be reſpected, as a part of the ſovereignty of the conſtitution, and as a repreſentation of the people. When any branch of the government ſteps beyond its authority, and undertakes to deliberate and act beyond its conſtitutional limits, and deliberates and acts on ſubjects not ſubmitted to it by the conſtitution, then it ceaſes to be a repreſentation of the people; its deliberations and acts derive no authority or reſpect from the conſtitution, and deſerve no more regard from the other branches of the government, than the deliberations and acts of any other unauthoriſed individuals; and it is, in this reſpect, no branch of the government, but (to uſe an expreſſion perhaps become threadbare) "a ſelf created ſociety," deſtitute of all public authority. Attempts of this kind, in any branch of the adminiſtration ought to be carefully watched. One encroachment indulged, forms a precedent for another. Power is, by degrees, withdrawn from thoſe hands, in which, the nation or people had lodged it; and exerciſed by thoſe to which the nation have not intruſted it; and the conſtitution is changed without the will of the people.—When any branch of the adminiſtration has ſucceeded, on a ſubject not committed to its diſcretion, to give its will the effect of a law, the legiſlature is changed, and, according to Locke, the government is diſſolved; a rebellion has taken place againſt the conſtitution, and the ſovereignty of the people; a rebellion the more atrocious, as it is under the ſemblance of authority, and effected by thoſe, whoſe public duty it is to ſupport that which they deſtroy. It is immaterial what branch of the government it is, whether the moſt popular or not, that ſucceeds in this attempt, the liberty of the people is equally deſtroyed, and a tyranny in this branch eſtab-

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liſhed. For the liberty of the people is the conſtitution. The conſtitution is their will and ſovereign act, defining the extent of their privileges, and the limits of all power. One branch uſurping a power not given it by the conſtitution, violates the conſtitution; and a conſtitution violated will ſoon be a conſtitution deſtroyed. Uſurpation is eaſier extended than begun: the barrier once broken no longer reſtrains; when the torrent has forced one paſſage, the dam is ruined; and when a breach is made in the wall, the city is deſpaired. If the people would preſerve their liberties, they muſt preſerve their conſtitution; and if they would preſerve their conſtitution, they muſt ſee that each branch of the adminiſtration be reſtrained within its conſtitutional limits, and ſecured in the free exerciſe of its conſtitutional authority.

No branch of the ſovereignty is more reſpectable, more independent, or more important, than that, in the adminiſtration of which we are now engaged, the judiciary. This branch of the government comes more home to the citizens, and bears more nearly, and with greater force, on their feelings, than any other. The manners and condition of ſociety are much affected by it. It can, better than any other, withſtand and correct the corruptions of the other branches, and give ſecurity to perſons and property. It can ſuppreſs every uſurpation, and many abuſes of power, in the other branches. By the judiciary, the authority of every legiſlative or executive act may be enquired into and declared valid or void. No law can be enforced on the citizens without the interpoſition of the judiciary. If the legiſlature enact a law, repugnant to any of the principles or proviſions of the conſtitution, any citizen affected by it, may, by calling in queſtion the validity of any act done under it, arraign this law before the judiciary;—which has power to declare it null and void, and altogether prevent its execution.* If any part of the ex-

* *Blackſtone conſiders this ſetting of the judicial power above that of the legiſlature to be ſubverſive of all government. His opinion ariſes from the nature of the Britiſh government, which has no written conſtitution, or law irrepealable by parliament.* 1 *Comm.* 91.

ecutive do an act not warranted by law, the citizen affected by it may bring it under the examination of the judiciary, which has power to declare it null and void, and punish the officer who did it. With a good judiciary, even a bad government may be rendered tolerable; and, with a bad judiciary, a government otherwise good will be useless or destructive. Upon the character of the judiciary, in a great measure depends the internal state of the nation; and every wise nation will, for its own happiness, be careful to render its judiciary enlightened, upright, independent, and energetic. *Sept. Sess.* 1796.

Every branch of the government is the agent or representative of the people; for it is the agent of the constitution, and the constitution is the will of the people. No branch of the government has any greater claim, than another, to influence, as the agent or representative of the people. All are equally organs of the constitution, or the will of the nation. To each is a portion of the sovereignty assigned by the constitution; and, in the exercise of its authority, each branch is equal and independent.

From the essential difference between the governments of the states of America, and of Britain, between a government with a constitution, and a government without one; we may see the error of applying precedents from the one government, as rules in the other. The parliament of Britain claims the whole sovereignty of the nation; not only the ordinary sovereignty, under a settled government, but the revolutionary sovereignty of the nation, the power of the whole people, when they have cast off their frame of government, to new model and alter their fundamental laws. The British parliament claims to be the British nation or people, and assumes a right to do every thing which the whole nation or people could do. And, if precedents from Britain were conclusive, an American legislature might claim to be the American people, with power to do every thing, which the American people can do.—Will any American legislature advance a claim like this? The constitution is the people, while the people permit it to exist. Every constituted authority is the people, within the extent of its authority, but no further. Beyond the extent of its authority, the legislature

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It may be aſked, ſince the people transfer their ſovereignty to the conſtitution and its adminiſtration, is there no check on the adminiſtration, in the exerciſe of the authority and diſcretion committed to its ſeveral branches?

From the extent of authority claimed by the Britiſh parliament, it would appear that it has no check, but the phyſical force of the nation. However ruinous be its laws, there is no authority to oppoſe them, and they can only be obſtructed by inſurrection and revolution.

Happily for America, we have other means of redreſs, without recurring to an expedient, at all times dangerous, and often more injurious and deſtructive, than the evil to be cured. The ſeveral branches of our government, the legiſlature, the executive, the judiciary, and the elective, mutually reſtrain each other. The conſtitution may be peaceably changed. An unconſtitutional law may be in effect annulled by the judiciary. Uſurped power in the executive or the judiciary may be reſtrained by the legiſlature. An improper exerciſe of authority in the legiſlature may be corrected by the elective branch changing the repreſentatives. Nor are the citizens ever reduced to the deſperate expedient, force, till all the branches of the adminiſtration have combined againſt the conſtitution, and reſiſted peaceable attempts to correct errors in its adminiſtration.—If a law has been ill made, appeal to the elective branch, at the next election. If a law has been ill interpreted, appeal to the legiſlature, for a new law. If a law has been ill executed, appeal to the judiciary. If

a diſqualified perſon has been elected, or appointed to an office, appeal to the proper judicial inveſtigation.— Reſtraints, and corrections of error, in the government, or any of its branches, are thus conſtitutionally eſtabliſhed; and it is hardly poſſible, to ſuppoſe a caſe, in which force is neceſſary in the free citizens of America. *Sept. Seſſ.* 1796.

Uſurpation of authority in the judiciary may be reſiſted by the executive, or corrected by the legiſlature. Uſurpation of authority in any of the other branches may be corrected by the judiciary. Every act without authority is declared void by the judiciary. If there be authority, though the diſcretion be not uſed in the beſt manner, the act is valid. Acting without authority, or abuſing it, is, of itſelf, in any officer merely miniſterial, a ground of poſitive puniſhment; and, if done corruptly, diſhoneſtly, or maliciouſly, may, in a judicial or diſcretionary officer, alſo be a ground of poſitive puniſhment. But in judicial or diſcretionary officers, a miſtake of authority, or an error in judgement, is no ground of poſitive puniſhment; but may be a ground of removal from office, according to the nature of the error, and the rules of the government. An elector, who votes indiſcreetly or improperly, is puniſhable only by the diſapprobation of his fellow citizens. A repreſentative, who votes indiſcreetly or improperly, is puniſhable by rejection from office, by his conſtituents. Theſe are conſtitutional checks on the adminiſtration; and, to preſerve the conſtitution and its adminiſtration pure, theſe checks muſt be honeſtly applied.

Our immediate duty, however, is of a more limited nature. However occaſions, like the preſent, may be, and I think properly, uſed, to ſtate general truths and duties, our official capacity, at this time, extends only to enquiries into ſuch breaches of poſitive law, as will ſubject the offenders to poſitive puniſhment. To this duty you will now proceed, and, as bound by your oath, diſcharge it diligently, truly, and impartially.

No. XIX.

The Conſtitution and Principles of our Government a ſecurity of Liberty.

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THAT the principles and modification of the government, under which he lives, be well underſtood, and its adminiſtration be examined with intelligence and candour, is of no little moment to the happineſs of every citizen. For unleſs the government and its adminiſtration be ſo underſtood and examined, there will be no fixed rule, by which public meaſures can be judged. They will be diſtorted by the wandering imagination of the ſpeculatiſt, the malignity of the factious, and the envy of the diſcontented; faults will be found, without cauſe, and calamities deplored, which have no exiſtence: inſtead of the applauſe of ſatisfaction, there will be the murmur of diſcontent, and repining, inſtead of gratitude. But in a government like ours, where the citizen has an influence and a ſhare in its adminiſtration, a competent knowledge of the principles, and a juſt eſtimate of the adminiſtration, of the government, are neceſſary, not only for his happineſs, but for that obedience, and civil and official duty, without which government becomes uſeleſs or corrupt.

The people of America live under a government of a complex or federate kind, like all other governments, produced by their neceſſities and faults; but, even at this day, almoſt ſingular in this, that it is framed by their own will. When the combining and controuling power of Britain, which had long kept the colonies together and protected them from each other and from foreign nations, degenerating to oppreſſion, was denied and rejected; neceſſity, and a prudent regard to their own ſafety induced them to ſubſtitute a confederation among themſelves inſtead of the ſupremacy of the mother country. And this confederation, weak and imperfect as it was, ſufficed during the fervour of a revolution, and the preſſure of external force, to maintain the union of the ſtates; for if men will be virtuous, or muſt be ſo, little energy is requiſite in government. But when

danger was paſt, and peace returned; when public liberty ſeemed no longer in hazard, and each began to look to private intereſt; when zeal relaxed into ſelfiſhneſs, and ſecurity took place of fear; the ſtrong pillars of this government were ſhaken, the cement which held it together was diſſolved, the confederation, as was then commonly ſaid, was found to be a rope of ſand: it had no ſtrength to effect the permanent purpoſe of national proſperity; and the reſources of the United States were found to languiſh, and their ſafety to lie at the mercy of foreign powers. A national government, of ſuch force as to call forth the energy, combine the exertions, and controul the perverſeneſs of the ſeveral ſtates, to dictate laws in all national caſes, and to exhibit an united and formidable power to foreign nations, was univerſally demanded, as eſſential to the independence and proſperity of America: and thus the conſtitution of the United States was framed and adopted. *Dec. Seſſ.* 1796.

In this government is veſted all authority over general or national and external ſubjects. To this government we owe, that we are not a number of ſeparate and hoſtile ſtates, mutually hating, embarraſſing, and injuring each other, unhappy at home, and contemptible abroad. And to this government we muſt owe the proſperity of our commerce, the payment of our debts, and our national defence.

To the government of each ſtate is ſeverally reſerved authority over local and internal ſubjects, the adminiſtration of juſtice, and protection of perſons and property within the territory of each. And to this government we owe the ſecurity of thoſe perſonal enjoyments which we regard, life, liberty, reputation, and eſtate.

Thus the government of the union, and the government of the individual ſtates, have each its ſeveral authority, object, and uſe; and acting within its authority, and for thoſe ends, each deſerves our confidence, reſpect, and ready obedience.

The government of the Union, and the government of the State, in their general outlines and principles, are ſo nearly alike, that obſervations on either will generally apply to the other. They both diſtribute the ſovereignty to different branches, aſcertain and limit the authority of each, and declare and eſtabliſh the pri-

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vileges of the citizen. They are not the work of accident or force, nor the excluſive and unwelcome dictates of uſurping individuals; nor have they derived reverence from age, or fictitious force from ſuperſtition or miracles; but they are the maxims of reaſon and experience, the choice of the whole people, and muſt depend for their force and exiſtence on the opinion of that people which eſtabliſhed them, on the approbation of the found judgment, the candour of the honeſt prudence, of the citizens of America. Derived from the whole people, and reſting only on truth, juſtice, and utility, there is no ſelect body of excluſive privileges to ſupport them, no falſe arts to buoy them up, nor military array to fortify them with terror. Like virtue and knowledge, they have force, while they are reſpected; but they may be ſhaken by ſuſpicion, and overturned by calumny; and the miſchiefs occaſioned by their ruin ſeen only in its conſequences, and felt when there is no remedy.

Some other governments have been eſtabliſhed, to promote the happineſs of one or a few; but ours is eſtabliſhed to promote the good of the whole people: and the principles neceſſary or proper for this purpoſe are laid down in the conſtitution, and carried into effect by the acts of the ſeveral branches of the government. It is in the conſtitution, and not in the opinions of individuals, that we are to diſcern the principles tending to the good of the people; for the conſtitution is the work of the whole people, the ſyſtem which they have choſen to promote their happineſs, the maxims by which every branch of the government muſt be directed, and by which only they can be tried. It is in the conſtitutional acts of the different branches of the government, and not in the opinions of individuals, that we can beſt diſcern the adminiſtration of the conſtitution tending moſt to the good of the people; for the branches of the government are the repreſentatives of the people, the organs of their will, as the organs of the conſtitution. So various are the minds and intereſts of the citizens, that it is impoſſible, that the conſtitution or the laws and other acts of the government ſhould conform to the opinions of all; but it is neceſſary that the opinions of all ſhould conform to the conſtitution, and the acts of every part of its adminiſtration; for the conſtitution and its ad-

miniſtration, however repugnant to the opinions of ſome or of many citizens, muſt be, and be believed, the will and work of the whole people. This is one of the moſt ſacred principles of a repreſentative democracy, and never can be violated without endangering the ſafety of the government, and the peace of the citizens. This principle will therefore be fervently cheriſhed and uniformly practiſed by every reflecting, wiſe, and good man, who regards liberty, and the maxims of a democratic government. The conſtitution is the ſtandard of liberty; and a conſtitutional adminiſtration is a government of freedom. And, while the conſtitution is reſpected by the adminiſtration, and both by the citizens, they are falſe friends, and real enemies to liberty, who diſſeminate ſuſpicions, and excite clamours, that liberty is in danger. However neceſſary a prudent *jealouſy* of its adminiſtration may be, to preſerve the purity of the government; it will be found, that a prudent *confidence* in its adminiſtration is not leſs neceſſary, to preſerve its ſafety, and the peace and happineſs of the citizens. While the people are vigilant and virtuous in the adminiſtration of their part of the government, there will be more danger from an unreaſonable jealouſy, than an unreaſonable confidence, in the other branches of the adminiſtration. In governments where the people have no part in the adminiſtration; where their duty is to ſubmit, not act; a falſe opinion in the people may produce no miſchief, effect, or influence; for it can be corrected by the government. But here, where, beſides the authority of election, not only the efficacy of its adminiſtration, but the very exiſtence of the conſtitution, depends on the opinion of the people: a miſtaken jealouſy in the people muſt be miſchievous, and may, at any time, overthrow the whole government; for there is no power, in any part of the adminiſtration, effectually to correct the errors of the people. A miſtaken confidence, on the other hand, can, at worſt, produce but a temporary evil: for an error in any other part of the adminiſtration may ultimately be corrected by the people, in the adminiſtration of their elective power. Of ſuch importance is it, that the people be taught to think juſtly!

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Our conſtitution acknowledges, in its full extent, the principle, that all government is derived from the peo-

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ple. But for the people to exercife all the power of government is impracticable, and to commit it to one man, or (which is the fame thing) to one body of men, is unfafe. Where there is all power, there is no control; but the paffions of men need checks and reftraint. Power muft therefore be balanced againft power, and authority fo combined with authority, that each, without obftructing or impeding another, may move in a prefcribed and regular courfe, giving energy and ufe to the whole. Thus (with reverence to make the comparifon) the Creator of the univerfe, while he gives to each orb its feveral circle and motion, combines the whole by their mutual attraction and their common gravitation to their central orb.

It is therefore both for convenience and fafety, that the fovereignty or power of government is broken into different portions, and diftributed into different hands or branches. One branch, the legiflative, makes laws; another, the executive, enforces them; another, the judiciary, explains and declares them when doubted or difputed; and another, the elective, appoints citizens to occupy the other branches, and exercife their feveral powers. Thus the powers of the people are exercifed by themfelves and their deputies with fafety and effect.

1. The great fecurity of liberty is, that the legiflative branch be occafionally appointed by the people, or by thofe whom the people chooſe for that purpofe.—Wherever this provifion is, liberty is fafe: for no law can be eftablifhed but by the confent of the people, that is, of their repreſentatives. This is the utmoft extent of rational liberty. Any thing farther is licentiouſneſs, anarchy, and mifery.

But a nation or people, like an individual, have their errors, their paffions, and their vices. To convert every impulfe of paffion, every fuggeftion of ignorance or weakneſs, or every dictate of iniquity and corruption into a law, would eftablifh a difcordant and dreadful code, more ruinous than the moft arbitrary deſpotiſm. Examine the giddy, tumultuary, and cruel decrees of Athens and of Rome. A people, therefore, with power, muft, like a rafh man with a fword, in fome meaſure, difarm themfelves, tie up their own hands, and fave themfelves from the miſchiefs of their own will. On

this ground, they bind themſelves to chooſe legiſlators, who ſhall be impartial, prudent, and ſkilful, and who ſhall have time for deliberation, and be independent in the exerciſe of their judgment. Hence the proviſions in our conſtitution, that the people cannot chooſe legiſlators, who have not arrived at a certain age, or have not reſided a certain time in the territory or diſtrict, or who hold certain offices; and that, when they have choſen them, they cannot withdraw their appointment, till the expiration of a certain period.* All theſe proviſions, and indeed all laws, would be uſeleſs, if the people were always wiſe, and always virtuous. But he, who reckons on this, reckons very falſely indeed: and conſtitutions and laws were framed on the ſuppoſition, that a people may be, as ſcripture declares that mankind is, both weak and wicked. *Dec. Seſſ.* 1796.

As even a ſelect body of men are but men, and, as ſuch, may be haſty, paſſionate, and prejudiced, it has been thought prudent, to ſeparate the legiſlators into two houſes, and make the conſent of each neceſſary to the making of a law. This, it is ſaid, gives a better chance for deliberation, accuracy, and intelligence in our laws. It would ſeem, there is reaſon and truth in this opinion: for we ſee nations, who have had the experience of a legiſlature of a ſingle branch, change it, for a legiſlature of two branches. France has done ſo. Pennſylvania has done ſo: and, though I had no ſanguine expectations from this change, I am inclined to think that it is an improvement; for I have known very falſe meaſures, great favourites of one branch, prevented by the prudence of the other. On ſimilar principles, and for its own protection, a qualified negative is given to the executive on the acts of the legiſlature.

A nation or people (for ſuch is the nature of man) being often giddy, fluctuating, and raſh, though they may ultimately think rightly, may haſtily take up a falſe opinion, and receive falſe impreſſions, from the ignorant declaimer, the pretended patriot, the artful and corrupt demagogue. Were legiſlators expoſed to the impulſe

* *U. S. Conſt. Art.* 1, §. 2, 3, 6. *Penn. Conſt. Art.* 1, §. 2, 3, 5, 8, 18.

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of every momentary popular paſſion, like a weathercock on the top of a ſteeple, turning to every wind, their laws would be uncertain, changing, and contradictory; their employment, like that of Penelope, would be a perpetual doing and undoing, making and repealing laws; there would be no uniformity of meaſures, nor ſteadineſs in purſuit of any one. At the ſame time, to appoint legiſlators for life, or for ſo long a time as might be conſidered as equal or approaching to that period, might give too great indifference to the juſt ſentiments, uſeful wiſhes, and true intereſts of the nation, and tempt to imagine or accompliſh a ſeparate intereſt of the legiſlators. To guard againſt both evils, the members of one houſe are choſen for a longer period than thoſe of the other. The ſenators of the United States are choſen for ſix years; the ſenators of Pennſylvania for four years. The appointment of one third part of the ſenators of the United States expires every ſecond year; the appointment of one fourth part of the ſenators of Pennſylvania expires every year. The members of the houſe of repreſentatives of the United States are choſen for two years. The members of the houſe of repreſentatives of Pennſylvania are choſen for one year. By the gradual renovation of the ſenate, it is preſumed, that a competent number of members, acquainted with the intereſt of the nation, and the means of promoting it, is preſerved, ſo as to ſecure a judicious and uniform ſyſtem in this houſe. While, at the ſame time, the annual or biennial appointment of the houſe of repreſentatives, without whoſe aſſent no law can be made, ſecures a ſufficient regard to the opinions and intereſts of the citizens.—And the return of the members of both houſes, after their period of appointment, to the ſituation of private citizens, with their connection of family and kindred, all affected by every law, ſo combines theirs with the general welfare, that it would be difficult for malice itſelf, to deviſe a temptation to abuſe their authority, or the wit of man, to invent a ſtronger ſecurity for the right uſe of it.

As the people, at the time of an election, are liable to be ſeduced by miſrepreſentation; and as many of them are, at all times, liable to receive falſe impreſſions, and form falſe judgements; it has been thought, that

the ſenate ought to be choſen, not as the houſe of repreſentatives, but by a ſelect number of electors choſen by the people for that purpoſe. The ſenate of the United States is ſo choſen by the legiſlatures of the ſeveral ſtates. But, even in this caſe, they are choſen by the people, for they are choſen by thoſe whom the people chooſe to chooſe them. So that, ultimately, the power of appointment is in the people. Conſidering the extenſive intereſts of the United States, we muſt think, that the period of ſix years ſervice in the ſenate is ſhort enough to acquire and apply a judicious experience, and that any diminution of that period would be an injury to our government, and render its adminiſtration leſs ſolid, ſtable, prudent, and uſeful. For ſimilar reaſons, it will be admitted, that allowing four years ſervice in the ſenate of Pennſylvania greatly promotes the ſafety, efficacy, and uniformity of the adminiſtration. And there is ground to believe, that the ſenates of the ſtate, and the Union, are our ſheet anchors againſt the fluctuating blaſts of levity and error, and the ſtorms of popular violence. *Dec. Seſſ.* 1796.

In this review of the legiſlative branch of our government, it appears, that the great principles of liberty are ſecured to the people; and that they are reſtrained from no liberty, except, in ſome caſes, liberty of doing miſchief to themſelves. And, when ſuch is the ſtate of our legiſlative, we may juſtly boaſt of a free government.

2. But vain are laws, unleſs they are enforced: theory, without practice, like faith, without morality, is unprofitable. It is not more important to liberty that the people ſhould *make* the laws, than that the people ſhould *obey* them. Liberty is a government of laws made by the authority of the nation. And it is the ſame thing, whether one or a few ſhall dictate laws to the reſt, or one or a few diſobey the laws of the reſt: for to diſobey is to make a law; and diſobedience of one is tyranny of one. That a law ſhall not be executed, is, in fact, that it ſhall be repealed. To repeal is to make a law: and if an executive ſhall not execute a law, the executive becomes a legiſlature, for it repeals a law;—and two branches of the ſovereignty are united in one; the branch choſen for one purpoſe exerciſes the powers

Dec. Seſſ. 1796. of another, and this amounts to uſurpation and tyranny. Laws are the will of the people, a neglect or refuſal to execute them is a neglect or refuſal to execute the will of the people. In every view that we can take of it, we ſhall ſee, that, if it be a principle of liberty, that laws be made by the nation, it muſt alſo be a principle, that they be ſtrictly and faithfully enforced and obeyed. Where the people have a ſhare or an influence in making laws, they ought to know the laws, that, if good, they may be continued, or, if uſeleſs or bad, be repealed. That laws be known, they muſt be felt by an exact execution. No opinion, therefore, can be more falſe, than that a relaxed execution of the laws is favourable to liberty. This opinion is directly oppoſed to every principle of liberty and repreſentative democracy. For, as to relax or ſuſpend its execution, is to change or repeal a law, a relaxation or ſuſpenſion of the execution of a law, unites the executive and legiſlative authority, ſets the executive above the legiſlative, deſtroys the conſtitutional controul of the ſeveral branches (which is the ſafe-guard of liberty) and changes the nature of the government.—This is, in fact, what was ſo much reprobated in Britain, a power aſſumed by the king to ſuſpend a law by a proclamation. And this is what is expreſſly guarded againſt by the conſtitution of this ſtate.*

As it is thus eſſential to liberty, that the laws be ſtrictly executed, the execution of them muſt be committed to hands which ſhall have no temptation to remiſſneſs. Senſe of duty is not, of itſelf, ſtrong enough to bind man; intereſt muſt be united with duty: there muſt be an advantage in doing right, and a riſk, if not a loſs in doing otherwiſe. A certain degree of independence on the people and the other branches muſt be given to the executive. This branch muſt have a fixed duration in office, and a competent ſalary, to induce an abandonment of private purſuits, and a faithful devotion of time and attention to public duty. Four years is certainly a ſhort enough duration in office for an uſeful diſcharge of the important duties of preſident of the United States.

A ſingle executive is conſidered as neceſſary, or

* *Art.* 9. § 12.

greatly conducive, to a right adminiſtration. There is a tendency, in numbers, to keep the whole in countenance in doing what any one would bluſh for. Participation ſeeming to leſſen the blame, leſſens the ſhame, of falſe conduct. Each hides his fault under the ſhade of another, and replies to cenſure, "you cannot ſay, I did it." Wrong is done; but no man is the doer. One of the ſtrongeſt motives to a right adminiſtration is withdrawn, when reſponſibility to public opinion is withdrawn. And, to preſerve this motive to a right adminiſtration (and motives to a right adminiſtration cannot be too much multiplied) and ſecure this reſponſibility, a ſingle executive has been thought neceſſary. Thus, by combining reſponſibility and independence in the executive, an exact and faithful execution of the laws is provided for. *Dec. Seſſ.* 1796.

3. It is eſſential, in the adminiſtration of government, that laws be juſtly and ſkilfully explained, declared, and applied. It is, therefore eſſential, that care be taken to frame a good judiciary, as a moſt important branch in the adminiſtration. Law, in all cultivated and commercial nations, becomes, in the progreſs of time, a ſcience of deep and complex learning; and it is neceſſary to make it a ſeparate profeſſion, and to commit its interpretation to a ſeparate body of men, whom ſtudy, experience, and reflection, have qualified for that important duty. Hence, in all countries, where a prudent proviſion has been made for the adminiſtration of juſtice, a judiciary, or ſelect and permanent body of men, for interpreting and declaring the laws, has been eſtabliſhed. To leave this important truſt to any changing or caſual body, would be ruinous to the liberty and ſafety of the citizens. Rules, maxims, and principles, eſtabliſhed to-day, would be contradicted, and overturned to-morrow. One deciſion would be no precedent for another; nor would the next court feel themſelves under any obligation to conform to the judgment of the former.—Law would be vague and uncertain, depending merely on the variable and occaſional feelings and ſentiments of a court never uniform, but always changing. There would be no certain rule of conduct, demeanor, or poſſeſſion. Life and property would be precarious. No

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man would know when he was ſafe; a man might be hanged to-day, for that, for which he was praiſed yeſterday; and the ſword of Damocles, ſuſpended by a ſingle hair, would hang over the head of every citizen.

But, in caſes ſubmitted to the examination of the judiciary, there are often two queſtions involved; what is true, and what is right; or, in other words, fact and law. In aſcertaining facts, there is not the ſame reaſon for uniformity or permanency, as in aſcertaining law. One man is neither bound, nor ſuppoſed, to act, as another has done; the ſame conduct is not preſumed in all;—though the ſame rule muſt, in all, be applied to the ſame conduct. Law muſt be uniform; but facts may vary. On the principle of diſtribution of power, that authorities may mutually check each other, the diciſion of law, and of fact, is committed to different hands. An uniform rule of right is eſtabliſhed by veſting the judges, or courts, a permanent body, with the determination of law; and an impartial inveſtigation is expected, from veſting in juries, occaſionally and fairly ſelected, the determination of fact. If either courts had the power of aſcertaining facts, or juries the power of declaring law, there would be no controul on either. One man might fall a ſacrifice to the partiality or malignity of a judge, and another, to the paſſion or prejudice of a jury. But when a ſettled rule of determination is eſtabliſhed, for all caſes, by a court; and an unbiaſſed inveſtigation of each particular caſe ſecured by a jury; a permanency of right and enjoyment is accompliſhed, by this diſtinct authority over law and fact; and the citizen may then truely ſay, that he is free, under a government of laws, and not of the paſſions of men. But this liberty only laſts, while this diſtinction is preſerved. For, if ever courts take upon them to aſcertain facts; or juries take upon them to declare law; the conſtitutional controul over each other is broken down: courts might determine, without truth; and juries, without law. Liberty would be deſtroyed, for all certain rule of conduct would be deſtroyed; and the property, reputation, or life, of any man might be ſacrificed to paſſion or caprice. The excellency of our judiciary is not merely that juries have a ſhare in the adminiſtration of juſtice; but that its adminiſtration is not wholly in one body of men; and

that a diſtinction of authorities, well marked and limiting the power of each, ſubſiſts in the judiciary. And it would be found, at leaſt, not leſs dangerous to the liberty and ſafety of the citizens, if juries were to uſurp a power to determine law, than if courts were to uſurp a power to determine fact. We have leſs obligation on juries, than on courts. Juries conſiſt of many, deliberate in private, and deliver a joint opinion; and, though they might be aſhamed to contradict fact, might cover their malice or favour, under a pretence of opinion or error in law, which it is not expected, they ſhould fully underſtand. They are ſelected but for an occaſion, and cannot be ſo open to public opinion, nor feel ſuch regard to public judgment, as courts, a permanent body, poſſeſſing an office ſuppoſed valuable, and expoſed to ſhame, if publickly they lay down one rule of law, in one caſe, to day, and another, in a ſimilar caſe, to-morrow. The principles of our judiciary ſyſtem, therefore, preſcribe, that the determination of law ſhould be made by the court, and the determination of fact, by the jury. Thus an impartial inveſtigation of facts, and a ſkilful and uniform deciſion of law, are eſtabliſhed, not merely in one court, but in every county or diſtrict. And we may challenge the world for a purer, more perfect, and more general adminiſtration of juſtice: an important ſecurity of our rights, and a diſtinguiſhed ſpecimen of the excellence of our government!

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But it is not ſufficient to form a good ſyſtem; practical ſecurities muſt be adopted for its due adminiſtration. Intereſt (I repeat the obſervation) muſt be combined with duty: all temptations to error and miſconduct muſt be removed; and motives to rectitude multiplied. The judges muſt be made altogether independent of the people, and of the other branches of adminiſtration. In England, while the judges held their places at the pleaſure of the king, they were mere machines in his hands, and were diſplaced, or continued in office, as they gave their judgments contrary or according to his will. A judge ſeems to have been diſplaced for an opinion, againſt the king's will, on a queſtion, whether a ſoldier ſhould be hanged in Middleſex or at Plymouth.* Such

* *See* 3 *Mod.* 124—5.

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dependence, in fact, annihilates the judiciary, and veſts its powers in the executive. Dependence deſtroys energy and authority; and a dependent judiciary is no judiciary. To preſerve liberty, and the balance of authority, the judges muſt be independent of the executive, of the legiſlative, and of the elective branch or of the people; by having duration of office and ſalary ſecured to them. Since this has been done in England, however corrupt may be the other branches of the government, no country can boaſt of a purer or more enlightened adminiſtration of juſtice. The ſame principles have been recogniſed and eſtabliſhed in America, and happily with the ſame ſucceſs,

It is faſhionable with ſome, who are perhaps leaſt qualified for a right judgment on the ſubject, to complain of the expence of the executive and judiciary.—Every citizen, who is called to devote a peculiar portion of his time to public ſervice, has a right to expect ſuch a compenſation from the public, as he would receive for like ſervices from an individual; and in few caſes indeed, if in any, has the public compenſation exceeded this eſtimate, but it generally comes ſhort of it. We find, that more is given by individuals, whoſe object is gain, for ſimilar or leſs important ſervices, than by the public, whoſe object is a due adminiſtration of the government; and that there is hardly any man in the executive or judiciary, of talents competent to the duties of his ſtation, who would not increaſe his gain, by devoting thoſe talents to the ſervice of individuals or of himſelf. If public offices are ſo extremely profitable, how comes it, that they are ſo frequently abandoned, and that we find men of talents generally ſhun them? There is not, I believe, a great office in the United States, which has not been reſigned, and has not been refuſed. Will we then complain of want of œconomy? And would we drive every man of talents from public ſtations? A public officer is but an annuitant; he cannot tranſmit his appointment to his poſterity; and he has but a few years in which he can make proviſion for a family, which may be left helpleſs by his death. If offices are made valuable, the obligations to duty are ſtrengthened by the fear of loſing them. If Offices are not valuable, officers may be remiſs in their duty, and diſregard all threats of removal.

4. Though this review of the principles of our legiſlative, executive, and judiciary conſtitution, diſcovers a perfect ſecurity of liberty; yet, however excellent be thoſe principles, their utility in practice muſt depend on the diſtribution and adminiſtration of the elective authority. This branch of government is exerciſed partly and chiefly by the people, partly by the executive, and partly by the legiſlature. The people chooſe the members of the general aſſembly, and of the houſe of repreſentatives in congreſs; they chooſe a governor, and electors of a preſident and vice-preſident of the United States; and they chooſe ſheriffs, who ſelect juries. The aſſembly chooſes ſenators in congreſs. The ſupreme executive chooſes the judiciary, and other executive officers. In this elective branch of the government, it appears, the people have reſerved to them as much ſhare, as may ſafely conſiſt with a judicious exerciſe of it; and by their immediate appointment of thoſe who make laws, and by the independent and energetic declaration and execution of them, a government of laws and liberty is ſecured. The elective power of the people ſo controuls each of the other branches, and ſo pervades the whole government, that it is impoſſible, that liberty ſhould be in danger, or adminiſtration be wrong, if the people exerciſe their elective power with judgment and integrity. The other branches of the government cannot be wrong, if the elective be right. If the people prudently and honeſtly adminiſter their ſhare of the government, there will be a prudent and honeſt adminiſtration. But corruption in them will corrupt the whole. And, unfortunately we have reaſon to fear, that, of all the parts of adminiſtration, that is the moſt corruptly or imprudently exerciſed, which is in the hands of the people themſelves; nor do we ſee any other public officer, who ſeems to care ſo little about the faithful and proper diſcharge of his truſt, as the citizen elector on the day of election. This is not flattery: I wiſh I could ſay, it is not truth. *Dec. Seſſ.* 1796.

It will be obſerved, that I have here conſidered the elective authority as a diſtinct branch of the government; and I conſider the citizens, while exerciſing this authority, as public officers, acting in the adminiſtration of the government. In this elective capacity, it ſeems

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not ſo proper to ſay, that the people are ſovereign, as that they exerciſe a part of the ſovereignty, or that their power is arbitrary, as that it is judicial, with ſound diſcretion and moral liberty. This idea may appear novel. I think it juſt; and ſhould be diſpoſed to carry it to its full extent. I would call election a public office, and the citizens, in this capacity, public officers, though not miniſterial, accountable, like judicial and diſcretionary officers, for neglect, corruption, or wilfully wrong exerciſe of their truſt. And I am inclined to think, that every citizen elector, might, by law, be compelled, as to any other duty, if he have no reaſonable excuſe, to attend and vote at elections, and be puniſhed for voting corruptly, or wilfully wrong.

In tracing the cauſes conducing to an indiſcrete or perverſe exerciſe of the elective power, a principal one will appear in the concealment of the conduct of voters, and in the little intereſt, which they take in the adminiſtration of government. Each conſiders his vote of but ſmall conſequence, in compariſon to the whole; knows he will not be called to account for the abuſe of it; thinks but a very ſlender part of the evil of his choice will fall on him; and is, therefore, content to intruſt the moſt important affairs of the nation to the management of men, with whom he would not intruſt the leaſt portion of his private intereſt.

Another cauſe of error in election is the incapacity of many of the electors, from ignorance, and inexperience, to form a juſt opinion, on important and complex national affairs; ſo that even when they are diſpoſed to chooſe honeſtly, they cannot chooſe wiſely, and many miſtake the dictates of vanity and preſumption, for the rules of good ſenſe, and the maxims of experience. To every friend of a repreſentative democracy, it is a mortifying obſervation, that boys, blockheads, and ruffians, are often liſtened to, in preference to men of integrity, ſkill, and underſtanding. This can only be corrected by the extenſion of knowledge, and a decent reſpect for wiſdom and experience.

But the great ſource of error in the people ariſes from thoſe parties, diviſions, and diſtinctions, which our weakneſs or wickedneſs excite among us, and which factious, diſappointed, and intriguing men lay hold of, to promote

their baſe and malignant views, and raiſe themſelves to conſequence. For this end, they give names to each other, and to thoſe names annex ideas of the moſt odious nature, that they can deviſe and render probable. Imputation amounts to guilt; impudent and open aſſertions gain credit, and men of the beſt diſpoſitions, and honeſt concern for the public good, are made to hate each other as fiends, and as foes to the principles and proſperity of our government. *Dec. Seſſ.* 1796.

In the French revolution, thoſe who favoured it, were called democrats; and thoſe, who favoured the old government, were called ariſtocrats. In America, where there is no revolution; where the principles of our government are as democratic, as a repreſentative government, with any chance of ſtability and uſefulneſs, can be; where I ſee no man, who endeavors, or wiſhes, to alter any of thoſe principles; where there is no privileged claſs of men, but all alike ſubject to law, and alike ſuſceptible of office; where there is no kind of ſimilarity between our ſituation and that of France, nor any thing whatever to juſtify their introduction; we have introduced the ſame names. In proportion as a man is ignorant and weak, the words *democrat* and *ariſtocrat* are familiar to him: and, like fools, who ſee ghoſts, we alarm ourſelves with phantoms of our own creation. Our government is a government of liberty, and all friends to it are friends to liberty; and thoſe men are alike enemies to our government and our happineſs, who ſow diſſentions among us, and propagate ſuſpicions of the views and tendency of its adminiſtration. Where is the branch or officer of government among us, that can have any intereſt in leſſening the liberty of the people? Muſt not every public officer ſoon become a citizen, or leave his children in that condition? Will he forge chains for himſelf and his poſterity? The idea is unnatural and abſurd. There is no reaſon for theſe ſuſpicions and ill opinions of one another, and of public meaſures. But there is a manifeſt reaſon for every malignant, factious, diſcontented, and ambitious man, to propagate and ſupport them. How can men without virtue or talents riſe into conſequence, but by ſlander, falſehood, and diſſention; by repreſenting the ſtate of things, and the conduct of government as erroneous and

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When Abſalom conſpired to dethrone his father, he prepared the way for his treaſon, and ſtole the hearts of the people, by diſſembled courteſy, humility, and concern for juſtice, and by malicious miſrepreſentation of David's government.*

When in the height of the glory and proſperity of the Roman republic, the impious, profligate, and deteſtable Cataline conſpired to involve Rome in plunder, maſſacre, and deſtruction, he procured accomplices in his horrid plot, by impudent and hypocritical pretences of virtue, benevolence, and patriotiſm, by invectives againſt the corruptions of government, and lamentations on the deplorable ſtate of the nation, the oppreſſion of the rich, and the miſery of the poor.†

When Iſabella, queen of Edward II. landed in England to dethrone her huſband, an innocent, inoffenſive, eaſy man; ſhe had with her the prince her ſon, the Earl of Kent, and her paramour Mortimer, the great mover of this enterpriſe, with two thouſand ſeven hundred and fifty ſeven men at arms; "a ſmall force," ſays Dr. Henry, "to invade ſo great a kingdom, and dethrone ſo great a king. But they brought with them a whole army of political lies, which did incredible execution, rendered the unhappy Edward odious and contemptible in the eyes of his ſubjects, and made the deluded people look on the perfidious Iſabel and the profligate Mortimer, as the moſt illuſtrious patriots, and deliverers of their country." To cover the guilt and promote the ſucceſs of her conſpiracy, the queen declared, "that the ſole deſign of her expedition was to eaſe the people of their burdens, to reform the diſorders of the government, and improve the liberties of the church." By theſe arts, "the people of England were wrought up into the moſt violent rage againſt the weak and miſguided Edward, as a cruel and inexorable tyrant; and into the higheſt admiration of the queen and Mortimer, as angels ſent from Heaven for their deliverance. But, when the true character and criminal union of this licen-

* 2 *Sam.* 15. † *Salluſt.*

tious pair came to be better known, the people began to open their eyes, to ſee that they had been deluded, and to pity the ſufferings of their wretched ſovereign." The ſhameleſs queen and Mortimer, ſeizing the fruits of their ambition, caſt off the veil with which they had covered it, uſurped the whole power, and engroſſed the whole treaſure of the kingdom, inhumanly butchered the depoſed king, and impudently trampled on the rights of the inſulted people.* *Dec. Seſſ.* 1796.

Cromwell, a fanatic, hypocrite, and tyrant, eſtabliſhed his military deſpotiſm in England, under the pretence of introducing a republic and the kingdom of the ſaints. With the moſt aſpiring ambition, he made the baſeſt profeſſions of humility, affected to accept ſovereign power as a burden, and that he might exert the duty of a conſtable; and he mocked God, that he might deceive men. He ſubdued the civil government, by perſuading the army, that the government was hoſtile to it. And he ruled the army, by ſetting one officer and party in it, againſt another.†

Robeſpierre raiſed himſelf on the ruins of the moſt zealous patrons of French liberty, by ſucceſſively denouncing every man and party, whoſe virtues and talents he feared, as ariſtocrats, royaliſts, and favourers of tyranny; till he made France a general ſlaughter-houſe, and left of liberty nothing but a name. Under the maſk of democracy and patriotiſm, he ſteeled the hearts, and debauched the principles and morals of the nation; and fell himſelf under that inflexible ſpirit of deſtruction, which he had excited..

Such is the ſpirit, and ſuch are the arts of baſe, factious, and wicked men. And let us conſtantly beware of thoſe, who, making great profeſſions of patriotiſm and virtue themſelves, denounce cenſures againſt the character and conduct of others, and againſt the principles and meaſures of our government. Eſpecially guard againſt ſuch arts, when they are exerted at the time of an election. The man who endeavours to miſlead the judgment, impoſe on the credulity, and ſo pervert the choice, of the citizens, in their elections of public

* *Henry B.* 4, *c.* 1, § 3, 4. *Hume, c.* 14, 15.
† *Hume, c.* 61.

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officers, poiſons the ſource of our government, and corrupts the whole maſs of the adminiſtration. To me this appears a crime of the firſt enormity, and deſerving the moſt cordial deteſtation. It is an offence againſt civil duty, indictable and puniſhable.

We had a remarkable ſpecimen of this on a late occaſion. Previous to the election of electors of preſident and vice-preſident of the United States, hand-bills, ſome of which are ſaid to have been fabricated in Philadelphia, and ſome in Waſhington, were circulated, with malicious induſtry all over this country; ſtuffed with a turgid and fooliſh rant of liberty and ariſtocracy, and with baſe and pitiful miſrepreſentations of the ſentiments, and falſe and ſlanderous invectives againſt the principles, of one of the earlieſt, firmeſt, moſt enlightened, uniform, and irreproachable patriots of America. When a man propoſed as a candidate, for an important public ſtation, is thus libelled, miſrepreſented, and abuſed, the injury is done to the people, rather than to him. The people are abuſed in their information, perverted in their judgment, and cheated of their choice; and it becomes every honeſt citizen, to unite in reſentment againſt the authors and promoters of the deluſion, and the hand of juſtice to bring them to puniſhment.

When we conſider from what ſmall beginnings great miſchiefs have ariſen, and how important it is, that all claims of right ſhould, in civil ſociety, be determined by an impartial and unprejudiced tribunal; we ſhall perhaps ſee reaſon to watch, if not to cenſure, an aſſociation of certain *actual ſettlers* on Beaver creek in this county,* publiſhed in the Pittſburgh gazette of 10th September laſt. Theſe, under a kind of corporate name of the *united ſettlers*, have agreed each to contribute a ſum of money to defend any law-ſuit, which may be brought to diſpoſſeſs any of them of the land on which he has ſettled, and, under the penalty of three thouſand dollars, to make no agreement or compromiſe, on any ſuch law-ſuit, without the conſent of a ſelect committee.

On ſtrict legal principles, ſince there is no common intereſt in the land, ſince the title of one is not the title

* *This and the following paragraph were delivered in Allegheny county only.*

of another, nor derived from it, nor affected by it, and since, therefore, the decision of one of their cases cannot govern or affect that of another; this seems to approach or amount to *maintenance*, which consists in an officious or unlawful intermeddling in the suit of another, by maintaining or assisting him with money or influence to prosecute or defend it; and is an offence against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law.* But I look more to the peculiar probable consequences of this case. We have judges to decide law; we have juries to decide facts. Is there any corruption or delay in our courts, to require or justify an association to obtain justice? Since juries are part of the tribunal, by which these claims are to be determined, and juries must be selected from the people of the county; is there no danger to the impartiality and integrity of decision from a numerous combination of the people of the county?— And may we not apprehend, when their claims are thus fortified by mutual confidence, and bolstered up by extrajudicial arguments and opinions, that a legal decision may be doubted, denied, and resisted; that law may, as we have seen it, sink under popular delusion and violence, and a new Wyoming be established among us. Our government is free; our administration of justice is intelligent, impartial, and unspotted by suspicion.— Let all claims, therefore, be quietly and fairly submitted to the decision of the law.

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* 4 *Comm.* 134.

No. XX.

Causes and Error of Complaints and Jealousy of the Administration of the Government.

WHEN we examine the principles of our constitution, we have reason to admire it, as an excellent form of a free government. And when we consider its binding force and acknowledged authority over all the branches of the administration, we have

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To have been in a ſituation of difficulty and danger, and to be extricated without injury, loſs, or cauſe of regret, is more than human nature, or human fortune will permit us to hope. To have adjuſted the ſufferings, ſervices, and debts of a revolution, and an eight years war; to have prepared, on a new and untried plan, and to have created intereſts to ſupport, a frame of government for thirteen extended and independent ſtates, of various prejudices and views; to have adminiſtered the government of thoſe ſtates, under all the errors of its ſtructure, and the perils of their condition; to have reformed this government, and adapted it to their varying circumſtances; and, hitherto, diſappointing the malicious hopes of our enemies, and the affectionate fears of our friends, to have conducted it proſperouſly, amidſt the conflict of a world in arms; is a taſk, which only

the ignorant and thoughtleſs will deem light. And to have executed this taſk without many errors, and many complaints, would have required a wiſdom, a virtue, and a fortune, far above the lot of man. When we view our paſt ſteps, our preſent ſtate, and our future fair and reaſonable proſpects; every candid and intelligent man, who juſtly eſtimates the difficulty of our affairs, and the frailty of our nature, will ſee abundant reaſon to reſpect the wiſdom and virtue of thoſe, by whom our government has been adminiſtered, and to admire the felicity of our fortune. *March Seſſ.* 1797.

As we ought not to hope, in man, for the virtue of angels, neither ought we to fear, in him, the malice of devils. A weak and erring creature, he is ſometimes miſled by ignorance, and ſeduced by temptation; but when he wilfully does wrong, it is for ſome cauſe, other than the pleaſure of doing it. The way to keep man right, therefore, is to point out clearly his duty, and remove from him all inducement to depart from it. The man, who, in this ſituation, does wrong, muſt have a degree of malignity not common in human nature; and the man who can eaſily ſuppoſe it in another, muſt feel ſomething in himſelf inclining him to do it. In this ſituation our conſtitution, as nearly as practical ſkill and prudence can direct, has placed all thoſe who are intruſted with its adminiſtration. The limits of authority are preſcribed, and temptations to abuſe of authority are, as much as poſſible, removed. No man can make laws to bind others, and not himſelf. No man can judge in his own cauſe. The authority of every man may be examined, and every man's abuſe of it puniſhed. All duty is defined; all power is limited; all intereſts are the ſame. There is no power, but, in ſome way, is derived from the whole community, and, in due progreſs, returns to it. There is no power, which abuſe of it does not determine. There is no privilege, office, or truſt, which is not acceſſible to the merit of any citizen, none which his merit can tranſmit to his poſterity.—There are no offices, truſts, or penſions, but for the public benefit; none, which the public will cannot aboliſh. What more effectual guards, than our conſtitution has eſtabliſhed againſt temptation to human

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frailty, could human prudence invent. That thoſe who have adminiſtered the government *have* erred, may be true; and that they *may* err, is true; for they are men. But, as the conſtitution has, as much as poſſible, removed temptation, we cannot, without proof, or without admitting our own corruption, ſuffer ourſelves to believe, that they have erred wilfully.

Beſides that ſecurity of liberty, and a faithful adminiſtration, which the principles of our conſtitution, and the nature of man afford us, we have an additional ſecurity, in the *ſtation* of thoſe who are intruſted with the adminiſtration of our government. If the elective branch exerciſe its powers with judgment and fidelity, it is hardly poſſible that the adminiſtration ſhould be wrong; for it will fill all offices with men of underſtanding, integrity, and knowledge: and ſuch appointments muſt produce a good adminiſtration. Conſidering therefore (as, where the elective branch acts properly, we ought to conſider) that appointment to office is an evidence of underſtanding and knowledge; we have, in ſtation, a ſecurity for a faithful adminiſtration. There is, in underſtanding and knowledge, a power, which thoſe who poſſeſs them not cannot feel, almoſt irreſiſtibly impelling to acquire reputation, by a faithful diſcharge of duty.—Underſtanding and knowledge furniſh a juſt eſtimate of the importance of virtue, and inſpire the mind with a deſire of it: and, however they may ſometimes yield to ſtrong temptation, it requires far ſtronger temptations to baffle the judgment, where they exiſt, than where they exiſt not. Let, therefore, the elective branch always fill offices with underſtanding and knowledge, as moſt juſtly and readily valuing and embracing duty.

Together with the conſtitution, nature and ſtation, we have, in that *character*, which ſtation enables public officers to form, a further ſecurity of a good adminiſtration. Is it to be ſuppoſed, that underſtanding and knowledge, which ſo ſtrongly impel to purſue virtue and duty, will not as ſtrongly impel to retain them? Character, reputation, or a good name, is not eaſily acquired, and will not leſs reluctantly be abandoned. It is not in the nature of man readily to give up that which we have hardly acquired, and highly value. Is it eaſy to conceive, that a Waſhington or an Adams, who have

derived all their fame from their exertions in the cauſe of liberty, would abandon the ſource of their glory and their pride ? *March Seſſ.* 1797.

We find, therefore, in the nature of man, in our political conſtitution, and in the ſtation and character of thoſe who adminiſter it, a competent ſecurity of our liberty, and a faithful adminiſtration. And I am perſuaded, that an accurate review of all the paſt tranſactions of our government will ſatisfy every intelligent and candid mind, that they are all conſiſtent with a ſincere deſire for the public good, and generally well calculated to promote it ; that the errors in it have been fewer, than in other governments in ſimilar circumſtances, and that, to account for thoſe errors, it is not neceſſary to ſuſpect corruption or any deſign againſt liberty ; for they may all be accounted for, by the fallibility of human judgment, and the variety of human opinion.

But why then, if our government has been ſo adminiſtered, and we cannot hope for perfection, do we hear complaints ? Complaint is as natural to man, as error. Falſe judgment is one of the natural errors of man.—And we are not leſs diſpoſed to cenſure others, than to approve ourſelves. Let any man look back on his paſt life, and, with his own compare the opinion of others on his conduct ; and then ſay, whether others form a right judgment of his motives and actions. If others be miſtaken, with reſpect to us, may not we be miſtaken, with reſpect to others ? And may we not all be miſtaken, in the judgment we form of the adminiſtration of the government ?

The adminiſtration, indeed, may have been erroneous ; but, without ſuppoſing error in the adminiſtration, we may account for complaint, from the nature of man, and of our government. Where the powers of government are limited to a few, they are ſuppoſed to qualify themſelves for the adminiſtration of them ; and others, who have no authority, may take no pains to examine or to judge, but ſubmit in ſilence. But, in our government, every citizen has a ſhare in the adminiſtration, and a right to examine its conduct. We are too apt to confound right with capacity, and power with ſkill ;—to think ourſelves qualified to do, what we are permitted

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to do; and, becauſe we *may* judge, to ſuppoſe that we *can* judge. Politics, legiſlation, or the art of government, is a ſcience, and, like other ſciences, to underſtand it, requires knowledge, ſtudy, and reflection. Reſpectable as this country is, we can hardly ſuppoſe, that the ſtate of education and knowledge in it is yet ſuch, as to enable all who *may* judge, to judge *rightly*, of the conduct of adminiſtration. And this difficulty is increaſed by the readineſs, with which our intereſt directs us to admit ſtrangers to a participation of our privileges. We ſometimes ſee thoſe, who, but a few months from Europe, and but ill qualified by previous knowledge or experience, have had little opportunity of underſtanding our intereſts, ſuddenly, and even before they have acquired the character of citizens, become the moſt forward to examine, and the moſt ſevere to cenſure, the meaſures of our adminiſtration. The difficulty, therefore, of general knowledge, will induce a prudent man, when he hears complaints of adminiſtration, to heſitate in deciding, whether the error be in the adminiſtration, or in the complaint; and to conſider on which ſide there is the beſt chance for a right underſtanding of the ſubject.

In the mechanic arts, a ſtranger will frequently be at a loſs to explain the uſe, and frequently be diſpoſed to cenſure the folly, of the different operations of the artiſan. But this happens more rarely in the common arts, becauſe the effect is ſo immediately connected with the operation, that we can more readily diſcern its uſe, and form a right judgment. In the ſciences, phyſic, law, &c. where our ignorance is greater, and can be leſs eaſily corrected, our miſtakes are more frequent, and more groſs. Under no government, perhaps, has juſtice been more purely and ſkilfully adminiſtered, than in courts of law in our government. Yet do we not ſometimes hear their deciſions arraigned, by the ignorant, as erroneous, and, by the malevolent, as corrupt and prejudiced?

We admit, that all nature is under the government of Almighty wiſdom and goodneſs: but is there any government, againſt which there are ſo many complaints? Where is the man that could not preſcribe better ſeaſons, better health, and better fortune, than we now receive from the Great Governor of the univerſe? If

we are not pleaſed with the government of God, can we wonder, if the government of man diſpleaſe us? And in whom ſhall we ſay is the error? *March Seſſ.* 1797.

Since we complain moſt, where we leaſt underſtand, we have reaſon to lay it down as a rule, that, where, as in our government, there is little temptation to error, complaints are in proportion to ignorance, and ariſe from it.

As our ignorance occaſions complaints, our information is often ill qualified either to juſtify or remove them. Our moſt diſtinguiſhed *clamourers* frequently derive their information only from newſpapers. I would not be underſtood to throw out indiſcriminate cenſure; but newſpapers are ſometimes publiſhed, not that they may be uſeful to the readers, but to the printers; not that they may inſtruct, but that they may be bought; and the object of the publiſhers is not ſo much to inform the judgment by juſt knowledge, as to excite paſſion and curioſity, and ſupport the party that will beſt ſupport their cuſtom.

Sometimes alſo we ſee men, who, diſappointed by accident, or deſtitute of uſeful talents to lead them to that rank or character, which their vanity or ambition ſuggeſts, ſeek popularity by cenſure and complaint againſt all meaſures. Unable to comprehend, they ſeem to dread, every propoſition which comes not from themſelves, and fill the country with their falſe clamours and fooliſh fears.

When we combine all thoſe cauſes, we may, without admitting that the adminiſtration of our government has been erroneous, perhaps juſtly, wonder, not that the complaints have been ſo many, but that they have been ſo few.

Beſides theſe internal grounds of diſſatisfaction, there is another, from which ſome nations have ſuffered much; but from which, I hope we have little to fear. The author of *A Hiſtory of the late Revolution in Sweden*, ſays "The framers of the Swediſh conſtitution, by placing their liberties beyond the reach of any attacks of their ſovereigns, imagined they had effectually ſecured them; and forgot they had left a door open for another ſpecies of corruption, equally fatal to liberty, and, in its conſe-

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We, diſtant from the courts of Europe, and inexperienced in their intrigues, can have but little knowledge or ſuſpicion of the artifices, by which the greater play off the ſmaller ſtates againſt each other. Under pretence of maintaining the peace of Europe, they are in a conſtant ſtate of concealed hoſtility; and, to preſerve the balance of power, each kingdom is perpetually on the watch for an opportunity of aggrandizing itſelf. Of thoſe European powers, France and Britain have long taken the lead; and, with all the influence which money and art can give, have mutually ſtriven to make every ſmaller ſtate a thorn in the ſide of each other, and light up the flame of war, whenever their ſeveral intereſts might ſuggeſt. For this purpoſe, they have maintained miniſters at every court in Europe, to watch the conduct of that court, and the miniſters of other nations there. But, as thoſe public agents muſt be known and ſuſpected, and ſo leſs competent for the neceſſary corruption and artifice; they have often been but ſhadows, without real confidence or power, and have been directed to receive inſtructions from others, who had no public authority. Or, if they acted uncontrouled, together with them, there were often ſent others, who poſſeſſing talents without a name, and exciting no ſuſpicion, could intrigue more ſucceſsfully. To thoſe public miniſters and concealed agents of the courts of France and Britain, was intruſted a competent management of powers and money. They interfered in all the internal meaſures of the ſtate in which they reſided. They excited parties, where they found none; and, where they found parties, they ſupported them. In theſe intrigues, principle was alto-

* *Sheridan's Hiſtory of the Revolution in Sweden, Part II. Sect. 2.*

gether diſregarded; except the principle of embroiling the government on which they acted, and accompliſhing the purpoſe they meant to effect. While, at one time, in Holland, the agents of France ſupported democratic or ariſtocratic factions, becauſe the agents of Britain ſupported deſpotic; in Sweden, they changed ſides; and each ſupported that in one country, which it oppoſed in another. And, in the ſame country, at different times, they adopted a contrary conduct, as their intereſt or views ſuggeſted. In Holland, or in Sweden, the miniſter of France was, at one time, on the ſide of democracy, and, another time, on the ſide of monarchy, as he could beſt wield the foreign ſtate to the purpoſes of his court. And the miniſter of Britain as certainly took the ſide oppoſite to that which the French miniſter headed. To ſecure his ſucceſs, each miniſter diſtributed money, fomented prejudice, and ſtirred paſſion, through the whole ſtate: and the parties of the diſtracted nation, deluded by their arts, or ſeduced by their wealth, believed or pretended, that they were ſtruggling for the intereſts of their country, when they were contributing to its ruin. By ſpies and bribes, thoſe foreign miniſters pried into all the counſels of the ſtate, which they were ſent to watch or corrupt. They endeavoured to influence all its conduct. If a treaty were ever ſo neceſſary and inoffenſive, they affected diſſatisfaction, feigned injury, embarraſſed its progreſs and execution, and excited clamour againſt it. If an election approached, they ſpread abroad reports, and exerted influence, bribes, and corruption, to ſecure the appointment that moſt favoured their views. The author whom I quoted, informs us, that, when the ſtates of Sweden aſſembled in 1765, the French ambaſſador was ſuppoſed to have laid out no leſs than 400,000 *livres*, in the election of the marſhal of the diet. But the Engliſh and Ruſſian miniſters had taken their meaſures ſo well, that the marſhal was of their ſide. What then muſt they have laid out!

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He alſo informs us, that, in 1766, Sweden concluded a treaty of friendſhip with England; the chief article of which was, that the ſubjects of each nation were to enjoy reciprocally, in their reſpective kingdoms, ports, and harbours, all advantages and immunities which the moſt favoured nation did then, or might afterwards en-

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Poland has long exhibited a melancholy example of the fatal effects of foreign influence on a divided people, and the deplorable ſpectacle of a nation broken to pieces by its own paſſions, and the violence of other powers.—The king of Pruſſia, in his memoirs from 1763 to 1775, has detailed (and he knew them well) ſome of the intrigues of foreign ſtates, and the miſerable pretexts under which they cover their ambition, rapacity, and hatred towards the unhappy nations, whom they embrace in their cruel and inſidious policy.

Mirabeau, the diſtinguiſhed defender of French liberty, reſided, ſome time before the revolution, as ſecret agent of France in Pruſſia. Of the means, which ſuch perſons uſe, we may form ſome idea from his expreſſions.

* *Hiſt. of Rev. in Swed. part II. Sect.* 3.

"I do not ſcruple," ſays he, "to affirm, that, by the aid of a thouſand guineas, the whole ſecrets of Berlin might be perfectly known.—It is impoſſible, that any thing ſhould eſcape the ambaſſador of France, if he be adroit, active, liberal, and has the art to invite proper gueſts to his *daily* dinners and ſuppers: for th.ſe are the efficacious means, and not *public* dinners. He is a kind of regiſter office, to which all the diſcontented, the babblers, and the covetous reſort.*" *March Seſſ.* 1797

Though, as they always oppoſed each other, one of them might ſometimes do good, yet it is not to be ſuppoſed, that the arts and money of thoſe foreign miniſters, to learn and influence the counſels of the nation in which they reſided, even when they promoted the good of that nation, were exerted for that purpoſe, or for any other purpoſe, than to promote the views of their own courts. Mirabeau, while at Berlin, ſeems to have been the agent of Mr. Calonne, then in the French miniſtry; and is ſaid to have written his letters to Taylyrand Perigord, late biſhop of Autun. Speaking of the diſturbances in Holland, he ſays, "The undoubted politics of our cabinet, are to render the ſtadtholder ſubſervient to the public good, and the independence of the United Provinces; not to procure his expulſion. A ſucceſsful pacification of the troubles of Holland would render Mr. Calonne more ſervice, than their continuation.—Should it be proved to Mr. Calonne, that the ſtadtholder is come over to the ſide of France, wherefore will he ſpoil his own game.†

If we examine the hiſtory of the minor ſtates of Europe, we ſhall find, that the agents of thoſe two nations, Britain and France, in oppoſition to each other, have been conſtantly engaged in endeavours to turn the counſels and exertions of every other ſtate, at whatever expence to itſelf, againſt the rival nation. Though war of the ſword may have ceaſed, war of arts and intrigue never ceaſed between them. And though, to ſucceed, they might cover their intrigues under the ſpecious pretence of the intereſt of the ſtate which they ſtrove to influence or aid, their real deſign was always the ag-

* *Anecdotes of the court of Berlin letter*, 64, 46.
† *Ib. Let.* 62, 61.

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With this diſpoſition, it was not to be ſuppoſed, that, when the American revolution commenced, France would be indifferent to ſo fair an opportunity of humbling the pride and power of Britain. Accordingly, as ſoon as it was ſeen to be no haſty riot or tranſient inſurrection, that would ſink under the force of the Britiſh government; but was likely to iſſue in the complete independence of the United States, the French court took a decided, open, active, and uſeful part in our favour. The reſentment ariſing from the war, and the diſputes ariſing out of the treaty of peace, left no inducement for France to increaſe our animoſity againſt Britain. But no ſooner did we endeavour to compoſe thoſe diſputes, by a treaty, neceſſary for us, and harmleſs to France, than here, as in other countries, France clamoured againſt that treaty; becauſe it reſtored us to a ſtate of amity with Britain.

I have no deſire to leſſen that juſt reſentment againſt the actual and intended injuries of Britain, or that juſt gratitude for the ſervices of France, which every American has felt. Nor am I ſatisfied, that the opinion is altogether correct, that a nation ought to have no paſſions. Reſentment and gratitude are uſeful paſſions, planted in man for good purpoſes. Reſentment of injury ought not to ceaſe, while redreſs is attainable, and not obtained. Nor ought gratitude for benefits to ceaſe, while retribution is practicable, uſeful, and not beſtowed. If Britain be no longer our enemy, but now diſpoſed to do us juſtice, ought not our reſentment to ceaſe? If our ſervices would be uſeleſs to France; if fighting no longer for her ſafety, but for her pride, ſhe ought not to claim them; and if, while they could only feed her *pride*, they would hazard our ſafety; ought gratitude to be exerted? It is no longer a queſtion whether the nations of Europe will acknowledge France as a republic. The combined armies no longer take her towns, or occupy her territory. Inſtead of defending her own, ſhe now overruns other countries; and continues the war to enlarge her own boundaries. Britain, her moſt dangerous enemy, has already ſent to her capital, to ſue for peace. And France may, whenever ſhe pleaſes, have the con-

ſent of all her enemies, to ſheathe her ſword, diſband her armies, and, under her republican conſtitution, retain all that vaſt empire, which her king governed. In this ſituation of France, and when we have omitted no ſervice, which, without injuſtice or ruin to ourſelves, we could beſtow; ſhall our gratitude be ſummoned to ſervices uſeleſs to her, and dangerous to us? And ſhall it be called ingratitude, without war, to have compoſed our diſputes with Britain, by a treaty, which has ſecured to us points eſſential to our ſafety, and contains no ſtipulation injurious to France? Though gratitude be a duty, both of ſtates and individuals; the firſt duty, both of ſtates and individuals, is ſelf-preſervation. States, like individuals, may often cover their conduct with pretences of generoſity and diſintereſtedneſs; but it will be found generally, that *ſelf* is at the bottom. Nor do we, but in romance, ſee Don Quixotes, who gratuitouſly labour through the world, to redreſs grievances. Among nations, as among individuals, where there is no common intereſt, there will be but little common ſervice. And, in both, a prudent man will always ſuſpect ſtrained profeſſions of generoſity, for ſymptoms of deceit. *March Seſſ.* 1797.

To a prudent jealouſy of other governments we ought to unite a prudent confidence in our own. Here the tie of common intereſt ſubſiſts. With a conſtitution reſtraining all the branches of the adminiſtration, and with frequent elections, what have we to fear from our government? Where there is no room for fear, there is no cauſe for jealouſy; and confidence becomes a duty, which we owe to our own happineſs and intereſt. A deciſive, firm, and energetic execution of the laws, is the health of a free government; and, to ſecure that, the hands of government muſt be ſtrengthened, by a juſt confidence. Where there is an influential repreſentation of the people, violations of the conſtitution are, at leaſt, not leſs to be feared from the legiſlature, than from the executive. The moſt popular branch is always the greateſt favourite; and favourites are always the moſt apt to abuſe power. The ſenate of Sweden determined, that they might ſupply the want of the king's ſignature, by affixing a ſtamp of his name; in other words, that, though he governed in form, they ſhould govern in re-

March Seſſ. 1797. ality. The houſe of commons in England raiſed troops, in the king's name, to fight againſt him; and, as ſoon as they found, that they could govern without him, they laid him aſide, and, after him, diſmiſſed alſo the houſe of lords, and took all government into their own hands.

But have not other nations loſt their freedom, by uſurpation of the executive?

Precedent or example becomes argument, only when caſes are ſimilar: and a variety of circumſtances contributed to deſpotiſm in Europe, which do not exiſt here. There, the king was conſidered as owner of the whole territory; and all eſtates were derived from him. He had a ſeparate eſtate annexed to his perſon, extenſive domains, and large revenue. All eſtates, that had no heirs, eſcheated to him. All, that were forfeited for crimes veſted in him. All penalties and forfeitures for offences were his. For the uſe of all theſe, he was not accountable. He commanded the whole force of the kingdom. He could raiſe and maintain armies of his own will, and direct them at his pleaſure. The adminiſtration of this revenue, and command of this force, combined with the turbulence and rivalſhip of feudal ariſtocracy, enabled the king to increaſe his authority at his diſcretion. This accumulation of eſtate, treaſure, force, and authority, enabled the father to tranſmit his poſſeſſions and authorities to his ſon, and made the crown hereditary; and this both tempted and enabled to render it deſpotic. While all were accountable to the king; his miniſters only were reſponſible for the acts of adminiſtration, and he was ſubject to no juriſdiction. The ſituation of our executive is ſo entirely different from all this; that the jealouſy, neceſſary in other governments, is not neceſſary in ours; nor does it ſeem to me proper to believe, that party ſpirit contributes to the preſervation of our liberties.

Let each of us look into his own heart, and charitably believe, that the virtues which he ſees in himſelf, exiſt alſo in others. Let us not ſuppoſe, that patriotiſm is confined to ourſelves, to our friends, or to our party; or that other opinions and meaſures than ours may not alſo be intended and adapted for the public good. Let us judge of men in public ſtations, as men; with the errors indeed, but alſo with the virtues of men, and ex-

amine their conduct with that indulgence to their weakneſs, and that reſpect for their integrity, which we owe to men, and as men expect to receive. Let us inſtruct, and, if poſſible, reform, but not hate each other. Having all a common intereſt in the proſperity of the ſtate, let us, as members of one family, work together in unity and affection, for the public good, and diſcharge our political duties, with fidelity and judgment. In electing to office, let us be careful to chooſe men of knowledge, underſtanding, and integrity; and then, repoſing, with confidence, in the excellence of our conſtitution, and the ſkill and honeſty of the adminiſtration; let us not diſturb our peace with groundleſs jealouſy, nor weaken the energy of the laws, by raſh cenſures, and erring complaints. And, with this ſpirit of faithfulneſs and reciprocal confidence, let us proceed to the peculiar duties of our ſeveral ſtations, at this time. *March Seſſ.* 1797.

No. XXI.

Diſtribution of the Powers of a Republican Government in ſubordinate Juriſdictions.

THAT man cannot be governed without force, is one of thoſe truths, which, as too often learnt only by experience, experience will laſt abandon. The young mind, unacquainted with the dangerous effects of human paſſions, cheriſhes the deluſive idea, that all men are virtuous, that they have no ſelfiſh views, but liſten to the voice of reaſon, and purſue the general good; that reſtraints on opinion and paſſion are unneceſſary, and puniſhments of miſconduct, cruel; that, to be free, we muſt be unreſtrained; and that exertions of the power of government are violations of liberty. Sentiments like theſe are received with the ſtupid applauſe of the ignorant, and with the malignant praiſe of the artfully wicked; and become the watch-words of party and the ſymbols of faction. The moſt ſalutary meaſures, and the moſt faithful miniſters of government *September Seſſions.* 1797.

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are ſuſpected, miſrepreſented, cenſured, and oppoſed; till falſehood triumphs over truth, paſſion over reaſon, popular opinion over public authority, and riot and inſurrection over order and peace: the main pillar of government, general confidence, is undermined; and licentiouſneſs deſtroys liberty.

Nor is it in politics or civil government alone, that theſe errors exiſt: every where wiſdom will be oppoſed by folly, knowledge by ignorance, prudence by raſhneſs, and virtue by vice. The moſt efficacious doctrines, and the moſt beneficent precepts, of religion, are cenſured, as unreaſonable reſtraints of human opinion and conduct; the moſt prudent diſcipline of the church, as encroachments on freedom of life and manners; and its moſt enlightened and honeſt miniſters, as enemies to human happineſs, ambitious ſeekers of power to themſelves, and tyrants over the conſciences of others.

Wiſdom and power will never uſe more means, than are neceſſary to accompliſh the end. If man could have been governed by reaſon, and a regard to duty, would the Almighty have had recourſe to myſterious doctrines of faith, poſitive precepts of practice, and the moſt awful and tremendous puniſhments? For the government of man, even in his moſt perfect ſtate, it was neceſſary to add, to the knowledge of duty, the fear of puniſhment, and denounce death to the tranſgreſſor. And human governments but imitate the divine, when they truſt not to man's reaſon and virtue alone, to preſerve him in obedience, but, knowing that force is neceſſary, prepare force, to keep him in peace, ſubmiſſion, and duty. Without force, neither can the uſeful purpoſes of government be accompliſhed, nor the government itſelf ſubſiſt. For (ſuch is the perverſe vehemence of human paſſion) a government, without a ready and conſtant command of force, will ſoon fall.

On this ground, we may account for its being received as a maxim, that a republican government is incompetent to an extenſive territory.

Though, in a republican government, laws, and not men, govern, and though laws be made by the whole people, yet, the people being numerous, no individual feels an attachment to the laws, as to his own authority. While there is no peculiar affection to the laws in any,

there is, in many, a ſtrong reſentment to them. The laws, which are made to reſtrain and puniſh offences, muſt be odious to offenders, and offenders are, in all countries, a numerous claſs. With them are aſſociated, in ſympathy at leaſt, all who, from like propenſities, may foreſee like danger to themſelves, and wiſh to prepare, in others, a precedent of indulgence to their future frailty. And, even in the moſt honeſt, there may, from the want of perſonal intereſt and of an enlightened mind, be leſs indignation for the wounded honour of the laws, than compaſſion for the ſufferings of the offender. While the people thus forget their own honour, the officers, in whoſe hands is the public force, feel too little intereſt in the office, and are too much within the reach of the people, to oppoſe their humour, or excite any individual reſentment by a ſtrict execution of the laws. By a faithful exertion of their authority, they are ſure to create ſome enemies, but no man feels himſelf thereby bound to be their friend. By indulgence to offenders, they are ſure to create friends, but no man feels that intereſt in public authority, as, therefore, to become their enemy. Thus the diſpoſition, both of officers and people, is too often inclined to relax the energy of the laws. Relaxation of the energy of the laws will certainly produce licentiouſneſs; and licentiouſneſs will certainly deſtroy the government. This will happen, even in a narrow territory. But in an extended territory all the cauſes will operate with increaſed force, and proportionally accelerate the criſis of the ſtate. According as they are remote from the ſeat of government, the vigilance of officers will be leſſened, their reſpect for the energy and dignity of the government diminiſh, and their motives to indulgence of offences will multiply. Temptations of ambition to ſet up ſeparate independencies will occur, or be ſuggeſted; combinations will be formed, for this purpoſe, which diſtance will render it difficult for the general force to reſtrain and ſubdue. Thus every thing will conſpire to produce a relaxation of the laws; and of conſequence, a corruption of manners, licentiouſneſs of practice, and a proſtration of morals. In this ſtate of ſociety, no government of laws can ſtand (for licentiouſneſs and laws can never ſubſiſt together), and a government of force muſt ſucceed.

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It reſults from all this, that, to make a republican government permanent, even in a ſmall, but eſpecially in a large, territory, it muſt be indeed a government of law, and not of the paſſions, either of the people or the officers. To make it ſo, it is neceſſary, not only to provide for the free and enlightened eſtabliſhment of laws, but alſo for their inſtant and energetic execution. To effect an inſtant and energetic execution of the laws, it is neceſſary to depoſit the public force in hands ſufficiently independent of the humours of individuals, and ſufficiently intereſted in the execution of the laws, at all times, to enſure ſuch an application of it, as will compel univerſal ſubmiſſion. And, in ſuch hands, the powers of government ought to be ſo diſtributed into every part of the territory, that it may reach, not only into the houſe, but, if poſſible (with reverence I ſpeak it) like the power of the Almighty, into the heart, of every man. If this can be done, a republican government of laws will, with the bleſſings of liberty, have all the ſtability and force of deſpotiſm; the people will be well governed; for they will be, at the ſame time, free and ſubmiſſive; and they will be happy, becauſe they will be compelled to be virtuous.

The force, then, of a republican government conſiſts in univerſal reſpect for the laws. While that ſubſiſts, the whole people is a ſtanding army, to compel their execution. When that fails, the laws will not be executed, and the government, which exiſts only in the laws, is then annihilated.

I may be reminded, that the republic of Rome governed a vaſt territory, and laſted a long time. But let it alſo be remembered, that it governed by a military deſpotiſm, and is no example to any other republic, which does not purſue the ſame plan.

When the conſtitution of the United States was under conſideration, this objection to a republican government, over an extenſive territory, was diſcuſſed. It was ſaid, that the objection applied only to a ſingle government over an extenſive territory, and not to a federate government, as is that of the United States. And it was ſtated from Monteſquieu,* that a federate repub-

* *Spirit of Laws, B. 9, c. 13.*

lic compoſed of ſeveral ſtates, united together under a general government, might preſerve itſelf from external force, the great danger to ſmall ſtates, and from internal diſſention, the great danger to large ſtates; and might become permanent. *Sept. Sess.* 1797.

This is the nature of the American governments. Sixteen States, each poſſeſſing all power neceſſary for the regulation of its internal concerns, are combined into one, poſſeſſing all power neceſſary for the regulation of the general concerns: and this ſcheme, on the principles of Monteſquieu, is competent to ſecure the ſtability of a republican government over an extenſive territory.

Admitting that this ſcheme is competent for this purpoſe, ſtill ſome proportion muſt be preſerved between the extent of the territory and the number of ſubdiviſions; for a large territory muſt be ſubdivided into more ſtates than a ſmall territory, or each may, more or leſs ſuffer the evils of an extenſive republic. The queſtion, then is, whether each ſtate be not too extenſive, for its government to ſuperintend, with efficacy, all its internal concerns; and whether there ought not to be ſubdiviſions, ſubordinate to ſtates, deſcending to a competency to the minuteſt public concerns, and riſing, in a regular gradation, one above another, the larger comprehending the leſs. The neceſſity of this ſeems admitted. For every ſtate is divided into counties, and every county into inferior diſtricts, which, in this ſtate, are called townſhips. This is the loweſt ſubdiviſion, and, perhaps, lower than this may not be neceſſary: except, that, as the ſame regulations, which are ſufficient for a country townſhip, may not alſo be ſufficient for a town; a town is often declared a ſeparate diſtrict, and incorporated, under the name of a borough.* Thus we have boroughs, townſhips, counties, ſtates, and the United States; and our political diſtricts, deſcending to the ſmalleſt limits, that convenience requires, become more extenſive, by degrees, and include each other, till the Union includes the whole territory of the United States.

But, while it may be admitted, that a competent government has been eſtabliſhed for the United States,

* *There is but one City in this ſtate.*

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and for this ſtate; and while it may be admitted, that this ſtate is ſufficiently ſubdivided into inferior diſtricts, it may yet remain a proper ſubject of enquiry, whether a competent government has been provided for the inferior diſtricts, into which this ſtate is ſubdivided; and whether this is not a ſubject proper for legiſlative conſideration. And this ſubject is the more open for diſcuſſion, as, if any new proviſion be proper, no extraordinary convocation of the people, nor any alteration of the conſtitution, is neceſſary, to effect it; but it may be accompliſhed by the ordinary exerciſe of legiſlative authority.

It may not however be improper, for a moment, to ſuſpend this enquiry, in order juſt to mention, that there is another diviſion of the ſtate with a view to elections. Several counties ſometimes compoſe one diſtrict, for the purpoſe of chooſing one or more ſenators in the aſſembly, or repreſentatives in congreſs. And now, I believe, every county is ſubdivided into election diſtricts, each compoſed of one or more townſhips, or parts of townſhips; within the bounds of which all the inhabitants meet at one place, to elect their county, ſtate, or federal officers.

The powers of government are uſually divided into three kinds, legiſlative, judicial, and executive; and I conſider it as eſſential, that, not only the whole territory, but every diviſion or diſtrict, into which it is divided, poſſeſs, within itſelf, full authority of the legiſlative, judicial, and executive kind, under the control, when any of its regulations or acts have a more extenſive tendency, of the ſuperior diſtrict or juriſdiction, which may be affected by them.

The authority of the government of the United States, extending over the whole territory of our federate republic, is defined in the conſtitution of the United States. The authority of the government of Pennſylvania, one of the diſtricts or members of the United States, extending over the whole of this diſtrict, is defined in the conſtitution of this ſtate. I do not take upon me to ſuggeſt any improvement in the federal or ſtate conſtitution; but proceed to enquire, whether a competent government has been provided for the counties and townſhips, into which this ſtate is divided and ſubdivided.

The United States is a corporation. Each ſtate is a corporation. But it has not been expreſſly declared, that every county, and every townſhip, is alſo a corporation. This ought to be done. *Sept. Seſſ. 1797.*

The authority reſembling the legiſlative, for the county, is veſted chiefly in the county commiſſioners, who are authoriſed to impoſe and apply ſuch ſums of money, as are neceſſary for the public ſervice and benefit of their reſpective counties.* This authority ſeems to be ample; and I think it proper, that the commiſſioners have complete legiſlative authority, to direct the internal taxes and improvements of the county. Beſides their preſent authority, they ought alſo to have power to declare any navigable ſtreams, within their counties, to be public highways; and to preſcribe where and how roads ſhall be made and maintained, at the expence of the county. The manner of their exerciſing this authority may be regulated by law, and, like other authorities, in all proper caſes, ſubmitted to the controul of the judiciary.

The commiſſioners come into office generally unexperienced in their duty, and, not ſeldom, with ſtrong prejudices againſt a right exerciſe of their authority; and, before they have overcome their prejudices, or learnt their duty, their authority expires. Thus the office of commiſſioners is too often filled, not with intelligence and public ſpirit, but with ignorance and obſtinacy; and the improvement and proſperity of the counties are greatly obſtructed. This might be remedied by doubling the time of their appointment, and electing only once in every two years; or, if this were thought proper, by doubling the number of commiſſioners, and electing one yearly.

The county judiciary is eſtabliſhed by the conſtitution of the ſtate on a reſpectable footing. The legiſlature has not yet, though they have the example of the courts of the United States, for this purpoſe, veſted the ſtate courts with chancery powers. This is an eſſential improvement yet wanting, and eaſily to be effected in the judiciary department. I conſider it as another

* 1 *St. L.* 217.

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defect in the county judiciary, that their records may, before judgment, be removed out of the county. All the purpoſes of uniformity might be effected, by making the ſupreme court, as to other counties, while it ſits in Philadelphia, a court for the deciſion of points of law only, without any jury proceſs; and by directing, that one or more of the judges of the ſupreme court, or with the preſident of the county court, ſhould, at ſtated terms, and, at leaſt, once in every year, hold a circuit court in each county, for the trial of all caſes removed from the county court into this circuit court. Judgments of the county courts might be examined in the circuit court, on writs of error; and judgments of the circuit court in the ſupreme court, which, compoſed as is now the high court of errors and appeals, ſhould be the court of laſt reſort in this ſtate.

The executive officers of the judicial authority are ſheriffs, coroners, &c.

The commiſſioners have power to appoint a clerk.—This is an officer eſſentially neceſſary to a proper execution of their truſt. Their proceedings ought to be accurately recorded, and their books and papers depoſited in a ſafe public office, under the care of their clerk.

A county treaſurer is alſo appointed by the commiſſioners, for the receipt of all the county and ſtate money within the county. He alſo ought to have a ſafe public office, and keep public books.

For the collection of public taxes, the ſyſtem of townſhip officers ought to be applied to.

The ſyſtem of townſhip government, as the leaſt important, has been the leaſt attended to; and it is from the improvement of it, not only as it concerns the ſeveral townſhips, but as part of the general ſyſtem, that the chief benefit, which I have in view, will ariſe.

At preſent, there is no general authority in a townſhip analogous to that of county commiſſioners. The care of the roads is committed to ſupervifors, and the care of the poor to overſeers. And, for theſe ſeveral purpoſes, they have, ſeverally, the authority of impoſing, applying, collecting, and expending the townſhip taxes.

The judiciary authority is veſted in a juſtice or juſtices of the peace, acting ſingly, and in an unſolemn and domeſtic way.

Conſtables execute the proceſs and decrees of the townſhip judiciary. But between the time of arreſting a defendant, on a warrant for a debt, and the time of hearing before the juſtice, it is not provided what the conſtable ſhall do with his priſoner.—Other inconveniences might be mentioned. *Sept. Seſſ.* 1797.

Aſſeſſors and collectors are employed in proportioning and levying the county taxes.

I would have the townſhip adminiſtration new-modelled, ſo as to render it competent to all townſhip purpoſes, and auxiliary to thoſe of the county, the ſtate, and the Union.

Every townſhip ought to be a little ſtate, with its legiſlative, judiciary, and executive; a corporation, with complete powers for the government of all its internal concerns, under ſuch regulations and controul, as may be thought proper. And there ought to be a *town-houſe*, in each townſhip, at which the different authorities of townſhip adminiſtration ought to be exerciſed. Annexed to this there ought to be a *town-gaol*. Around the town-houſe would naturally grow a ſmall village, which, being under the eye of the townſhip authority, would be better regulated, and more remarkable for decency of manners, than country villages, without ſuch ſuperintendence, too often are. There the country manufacturers would naturally be collected, and would improve each other. And much time, now waſted in travelling from one to another, would be ſaved.

The legiſlative authority of the townſhip ought to be veſted in townſhip commiſſioners, appointed, like county commiſſioners, and, like them, having full authority, to impoſe and appropriate ſuch ſums of money, as are neceſſary for the improvement and benefit of the townſhip. They ought, for example, to have power to declare what roads ſhall be laid out and maintained at the townſhip expence; to direct the regulation of fences; to provide for the ſupport and employment of the poor, if they ſhall continue to be a townſhip charge; and, without multiplying inſtances, to do all things neceſſary for the public benefit of the townſhip.

It has been propoſed to the legiſlature, to employ and maintain the poor at the expence of the county. Seve-

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ral objects, now committed to the care of the townſhips, might be diſtributed, according to their magnitude, to the ſuperior diſtricts. There might be hoſpitals or work-houſes, for each county, ſupported by the county; for each ſtate, ſupported by the ſtate; and for the United States, ſupported by the United States. There might be roads ſupported by the county; roads, ſupported by the ſtate; and roads, ſupported by the United States.—Other objects of public care might be, in like manner, diſtributed to the juriſdiction affected by them, in proportion to their importance.

Every man muſt have had occaſion to regret, that the dignity of the judicial branch of government is, ſometimes, not well ſupported, in the domeſtic and unſolemn manner in which the townſhip judicial authority is exerciſed. For the improvement of it, I would recommend, that, though juſtices may iſſue warrants, or other original proceſs, at their own houſes, or as occaſion requires, and may, there, examine any incidental queſtion; yet that the juſtice, and if there be more than one, the juſtices of the townſhip, ſhould meet, and hold a townſhip court, for trying and determining cauſes, in the town-houſe, at ſtated times or court days. Every warrant or ſummons iſſued for any debt or demand, by any juſtice in the townſhip, ought to be made returnable at the town-houſe, on the next court day, and the matter there heard by the juſtice or juſtices, in the town-court.

At the meeting of this court, every juſtice of the townſhip ought openly to return into court all his domeſtic official proceedings, relative to convictions, or any other part of his juriſdiction.

When a conſtable has received from a juſtice, or from the town-court, any proceſs, he will proceed to execute it. When he has arreſted a defendant on a warrant for debt, he ought to have authority, like the ſheriff, if bail for his appearance at the next town-court be not given, to commit him, for ſafe cuſtody, to the town-jail. Before the ſitting of the court, on each court day, the conſtable ſhould return all his proceſs, at the town-houſe.

A clerk ought to be appointed in each townſhip, to receive all the returned proceſs from the conſtable, and all the domeſtic proceedings from the juſtice or juſtices,

and enter them in a book, and to keep a record of all the proceedings of the town-court. This would prevent many irregularities in the proceedings of juſtices, from which parties before them now ſuffer not a little. The ſame clerk might alſo be the clerk of the townſhip commiſſioners, and record all their proceedings. *Sept. Seſſ.* 1797.

All taxes in the townſhip may be collected by the conſtable, and paid over to a townſhip treaſurer, whoſe duty it ſhould be, to pay over all county taxes to the county treaſurer, who would pay over all ſtate taxes to the ſtate treaſurer.

The application and expenditure of money raiſed for the uſe of the poor, the roads, &c. may be intruſted with officers appointed for that purpoſe.

Every county town ought, of courſe, to be a borough, and every borough out to have a ſeparate government, for its internal concerns, on the plan of a townſhip, modelled to its peculiar circumſtances.

This townſhip adminiſtration might be applied to various uſeful purpoſes.

1. The townſhip commiſſioners and juſtices, ſitting together for that purpoſe, might have power to fix on the place, where a town-houſe and gaol ſhould be built, and direct their building.

2. To them alſo might be aſſigned the duty of fixing the number of taverns in the townſhip, and recommending proper perſons for licences to keep taverns.

3. Public inſtruction is a public duty: and the conſtitution of this ſtate has directed the legiſlature to provide for the eſtabliſhment of ſchools.* As various grades of ſchools are neceſſary, univerſities, colleges, academies, and ſchools commonly ſo called; the eſtabliſhment and direction of them may be committed to the adminiſtration of the reſpective territory or diſtrict. There may be ſchools eſtabliſhed for the United States, for each ſtate, for each county, and for each townſhip. The townſhip ſchools may be eſtabliſhed by the townſhip commiſſioners and juſtices; and taxes for their eſtabliſhment, and, if neceſſary, for their ſupport, be impoſed by the commiſſioners.

* *Conſt. vii.* 1.

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Religion, as a part of public inſtruction, and an eſſential ſupport of government well deſerves public attention and authority, to ſupport its miniſtration: and public authority might be exerted in this part of public inſtruction, in the ſame manner, as in the caſe of ſchools.

Public inſtruction, in theſe two articles, may, to ſome appear more exceptionable, than any other point ſtated in the ſyſtem propoſed. But I am perſuaded, that, in proportion as prejudice is ſubdued, and the attention fixed to this ſubject, its importance will manifeſt itſelf. What is man without inſtruction! And how ſlender is your hold on his mind without religion!

4. An important uſe might be made of this townſhip adminiſtration, in conducting elections, one of the moſt intereſting tranſactions in the adminiſtration of the government.

It has been remarked, that large aſſemblies are apt to be tumultuous; and, therefore, and for the convenience of the electors, counties have been divided into election diſtricts. But, from the preſent method of conducting elections, many evils ariſe. There is no uniformity, nor ſolemnity, nor regularity, nor, ſometimes, honeſty, in their management. The election officers are often unſkilful in that, or any, kind of buſineſs; and the places where the elections are holden, are altogether unfit for a proper or accurate manner of holding them. So that, as they are now holden, it would be much better, that there were no diviſion of a county into election diſtricts, and that all the electors aſſembled at the court-houſe, where there would be more means, and, from the habit of ſolemnity, a greater chance, for an accurate and regular election, than at the places of diſtrict election.—The inconvenience of the places of election, and the want of ſkill and care in the election officers, occaſion many errors and frauds in the election. It has even happened, that the election officers have not been ſworn, till the election was over; and it is notorious, that they take no pains to enquire, whether thoſe, who offer their votes are qualified as electors. It ought to be remembered, that election is a part of the adminiſtration of the government; and, for a man not qualified as an elector, to exerciſe this duty, is to uſurp ſovereign power. For this reaſon, the law of Athens puniſhed with death a

ſtranger, or unqualified perſon, who interfered in the aſſemblies of the people. And the introduction of a great number of ſtrangers among the citizens of Rome, Monteſquieu conſiders as one of the cauſes of the ruin of that republic.* *Sept. Seſſ.* 1797.

Elections might be, at the ſame time, convenient, regular, ſmall, and ſolemn, if every townſhip, and every borough, were ſeverally declared a ſeparate election diſtrict, and the electors of that diſtrict were required to meet at the town-houſe, and give in their votes, under the inſpection of the townſhip commiſſioners and juſtices, who, or as many of them as ſhould attend, ſhould conduct the election. The townſhip clerk, or with an aſſiſtant appointed for the purpoſe, by the attending commiſſioners and juſtices, ſhould, under their inſpection, enter the names of the voters in a liſt, caſt up the votes, and minute all the proceedings of the election. The ſolemnity of the place and the officers, from the habit of the tranſaction of important buſineſs, would ſecure a regular and ſolemn election. The multiplicity of diſtricts would diſcourage intrigue. The preſent authority, and the vicinity of the gaol would repreſs tumult. And the ſmallneſs of the diſtrict would enable the electors, in the greateſt number, and in one day, to chooſe all their officers, for the townſhip, the county, the ſtate, and the United States.

To prevent unqualified perſons from voting, it ought to be required, that all the citizens in each townſhip, qualified to vote, ſhall, at ſome townſhip court previous to their offering their votes, have their right to vote examined by the juſtice or juſtices, and their names inſcribed by the clerk, in a roll of electors, to be kept by him, digeſted in an alphabetical order; and that no vote ſhall be received at any election, from any man, whoſe name is not inſcribed on the elector roll of the townſhip. Without this, or a ſimilar regulation, I ſee no effectual and convenient precaution againſt unqualified perſons intruding themſelves into our elections.

When the election is finiſhed and aſcertained, the reſult of it, ſo far as it reſpects townſhip officers, ought to be recorded by the town clerk; and a copy of it, certi-

* *Spirit of Laws, B. 2, c. 2.*

Sept. Seſſ. 1797. fied by him, be tranſmitted to the county court, and to the county commiſſioners, to be inſerted alſo in their records. So far as it reſpected officers of the county, of the ſtate, and of the United States, it would be, as now, tranſmitted to the county town, and diſpoſed of, as the laws direct.

Together with the reſult of the townſhip election, a copy of the minutes of proceedings, as of the roll of electors, the names of the election officers, the liſt of voters, the number of votes for each officer and candidate, certified by the town clerk, ſhould alſo be tranſmitted to the county town, and, after careful examination, depoſited in the prothonotary's or commiſſioners office.

Other advantages might be ſtated, or occur in experience, from this townſhip organization. The principles of this plan might be varied and improved. The county commiſſioners and judges might have authority to alter the arrangement of townſhips, and, from time to time, enlarge or leſſen any of them. And it deſerves conſideration, whether, in each townſhip, there ought not to be a ſelect body of militia, whoſe peculiar duty it ſhould be, to ſupport the laws; to any officer of which, together with the proper civil officer, any magiſtrate might, when he thought proper, direct his warrant.

Thus, on a general model, might be eſtabliſhed in every neighbourhood, a particular government free and energetic, competent to afford inſtant protection to every peaceable man, and inſtantly ſecure for puniſhment every tranſgreſſor. The force of the laws would be more within the view, and nearer the feelings of all. The laws would therefore be more reſpected; and, in proportion to the reſpect for the laws, the government would be uſeful, ſtable, and permanent.

Whether this ſyſtem ſhall be adopted or not, it lies not with us to determine; but it is a proper ſubject for the ſerious conſideration of us all. And it is peculiarly our duty, at this time, in our ſeveral ſtations, to promote reſpect and obedience to the laws, and ſo to promote the efficacy and happineſs of our government. And, for this end, let us proceed to enquire, whether, how, and by whom, any public law has been violated, within the juriſdiction of this court.

No. XXII.

Abſtract principles inſecure grounds of a Democratic Government, unleſs the People can be made wiſe and virtuous.

December Seſſions. 1797.

WHETHER a whole people, even in a repreſentative form, be qualified to govern themſelves, remains yet a matter of experiment. The people of the United-States have made the experiment; but their government has been of too ſhort duration, and, in the little time of its exiſtence, has been too rudely ſhocked, to juſtify a confidence, that the experiment will be certainly ſucceſsful, and may be ſafely tried by all nations. Man was intended by his Maker, for it is declared to be his duty, to be governed by reaſon; and to acquire knowledge, for he is calculated to receive it. And, were it poſſible to ſuppoſe a whole people virtuous and intelligent, we might believe them capable of governing themſelves. But let the enquiry be made, and in what inſtance ſhall we find, either in the more private or common concerns of life, that men are generally directed wiſely or virtuouſly, that they do not often commit great and dangerous errors, and ſometimes ruin themſelves? And is the ſcience of government (one of the moſt comprehenſive, delicate, and difficult of all) the only one in which a whole people can never err, which a whole people can well underſtand, and a whole people wiſely conduct?

In almoſt every thing elſe, we call in the ſenſes and imagination, to aid the judgment. Our tables, our houſes, our gardens, muſt not only be commodious and abundant, but adorned with all the decorations of art and taſte. Female beauty, the moſt enchanting of all objects, reſts not on its own charms, though heightened by virtue and wiſdom, to inſpire and ſecure regard, but ſeiſes and arreſts the attention by the ſplendour of ornament. Nay, religion itſelf, the ſublime ſpectacle of nature, and the awful contemplation of the Deity, has been found inſufficient, to excite and warm the devotions of the people, without the pomp of churches, the viſions of paint-

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ing, the raptures of poetry, and the extacies of muſic. It is thus that even the Almighty has choſen to govern man. He has not left the preſervation of the individual or the ſpecies to a cold and imperious dictate of duty, or the ſlow deductions of knowledge and reaſon, but ſecured obedience to his law by the impulſe of appetite, and the deluſions of pleaſure. And it is thus, that, learning from their Maker, thoſe, who govern man, muſt lead him by his ſenſes, his impreſſions, and his fancies, as well as by his reaſon and his knowledge.

Accordingly moſt nations have, more or leſs, uſed the imagination and prejudices of man, as well as his reaſon, to govern him; and have added to the force of power, the influence of opinion. In order to raiſe the imagination of the people to a due reſpect of his authority, ſome have thought it neceſſary to make their prince inviſible, and feign him immortal. In imagination, exalted as a god, and approaching divinity, the obedience of his ſubjects reſembles the worſhip of religion and the zeal of devotion. It comes from the will, and from the heart. The ſource is unſeen, but the power is irreſiſtible. Like mount Sinai, it is not to be touched by the people; and his miniſters, like Moſes, alone approach the preſence of their ſovereign, and receive his laws. A regular gradation of ranks tranſmits them through the nation, and reſpect, proportioned to their ſtations, is attached to all, who are concerned in the adminiſtration of authority. A ſanctity is ſuppoſed to be inherent in public office, as in the diſtribution of the bleſſings and the will of Heaven. Mutual reſpect and deference pervades the whole; the gentle influence of opinion tempers the rigour of force; and obedience becomes a ſource of comfort and pleaſure.

Without ſome aid of this kind from opinion, it will be difficult, to maintain the balance of public authority againſt individual force, and preſerve that ſuperiority of reaſon over paſſion, and of right over rapacity, without which, there can never be liberty of acting within the limits of law, nor equality of enjoying the fruits of our own exertions. Without ſome aid, therefore, from opinion, in ſupport of authority, it is difficult, and, if alſo without force, it is impoſſible, to maintain true liberty and true equality.

Yet the people of America have made the hazardous

experiment, of founding a government on the principles of liberty and equality, and ſupporting it neither by opinion nor by force. *Dec. Seſſ.* 1797.

Liberty and *equality* are not names of real objects, as a *field* or a *tree*, of whoſe nature we are informed by our ſenſes. They are abſtract terms, whoſe meaning is unfixed, and hard to be explained or underſtood. When liberty and equality are announced to a whole nation, as the unalienable rights of man, the queſtion, in their practical effect, will be, not what they who declare, but what they who receive, thoſe rights, underſtand by them. Their practical effect will be according to the ſenſe in which they are underſtood by thoſe who have an agency in the government. And, if the whole people have an agency in the government, their practical effect will be according as they are underſtood by the whole people. If they be declared to a nation of philoſophers, accuſtomed to enquire, to compare, to reaſon, and to judge; they will be underſtood in a philoſophic, rational, and juſt ſenſe. But if they be declared to a people unſkilled in metaphyſical diſcuſſions, definitions, and relations, in logical inveſtigations, and rational deductions; they may be received in a ſenſe looſe and uncertain, that may contradict all the rules of nature and providence, and ſhake the foundation and ſtructure of any free government. And, according to the ſenſe in which they ſhall be received will be their practical effects.

For, if *liberty* and *equality* be conſidered as the *rights of man*, and the *rights of man* as paramount to all artificial conſtitutions and laws; *liberty* and *equality* being abſtract and undefined terms, every citizen undertakes to judge of their meaning and extent; and whenever, in his opinion, any conſtitution or law infringes liberty or equality, undertakes to pronounce ſuch law or conſtitution void. With ſuch principles, among an ignorant people, what government, unſupported by opinion or force, can long ſubſiſt?

That abſolute liberty was never intended for man, the works of nature, and the ways of Providence, plainly ſhow. Our capacities, our exertions, our enjoyments, are reſtrained. Every where, our will meets obſtacles, and our wiſhes diſappointment. Mutual dependence, and mutual reſtraint, is the natural lot of man.

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That abſolute liberty would be dangerous to man, is not leſs clear. If every man were at liberty to do as he pleaſes, there would be an end of all ſafety to any. It is for the purpoſe of reſtraining abſolute liberty, that governments are eſtabliſhed.

To underſtand liberty, in its true ſenſe, to aſcertain its limits and relations, requires intelligence, knowledge, and reflection. But theſe are not to be expected in a whole people. For, among a whole people, far the greater number muſt ſpend their days in labour, and muſt want leiſure, to cultivate their minds, and acquire knowledge. The greater number muſt have inaccurate, and many muſt have falſe, notions of liberty. Some will ſuppoſe that liberty is infringed, if certain laws, contradicted neither by the principles of reaſon, nor by the conſtitution, are made, and executed. Some will ſuppoſe liberty infringed, if the exerciſe and enjoyment of certain rights and privileges, which the intereſt of the ſtate requires to be limited to ſome, be not extended to all. If liberty be conſidered as one of the rights of man, paramount to any conſtitution or law, and there be falſe notions of liberty, and thoſe, who entertain them, have an agency in the government; the conſtitution and laws are in danger, in proportion to the number of thoſe who entertain falſe notions of liberty.

Equality, another abſtract term, in an abſolute ſenſe not leſs unnatural, and to be reduced to a juſt ſenſe not leſs difficult, may have conſequences not leſs dangerous to the government, than liberty, untempered by virtue and knowledge, by opinion, or by force.

Abſolute equality of man is, in the nature of things, impoſſible. Nature and Providence have oppoſed it by impregnable barriers. Different degrees of ſtrength and induſtry in body and mind muſt neceſſarily produce, even if Providence did not, by what is called good or bad fortune, promote and maintain a perpetual inequality among men. Attempting therefore, to produce or maintain abſolute equality among men, is declaring war againſt nature and Providence, and, in that conteſt, no human power can ever ſucceed.

If equality, in its abſolute ſenſe, be impoſſible, and if it be publiſhed, to a whole people, as one of the rights of man, and if that whole people have an agency in the

government, and thoſe rights be paramount to all conſtitutions and laws; its practical effect on the government will depend on the ſenſe in which this equality; an abſtract and undefined term, is underſtood by the whole people. *Dec. Seſſ.* 1797.

Some will underſtand, by it, an equality of property; that no man ſhall have more land, houſes, or wealth, than another. With ſuch, all laws, for the protection of property, and ſecuring the fruits of induſtry, will be conſidered as infringements of the rights of man. The motives to induſtry will be leſſened. Men will be afraid to be conſidered rich, leſt their ſurplus ſhould be ſeiſed, or ſubjected to extraordinary taxes. Wealth, the fruit, and the parent of induſtry, will be buried: and the poor will be deprived of that employment which gives them bread.

By equality, ſome will underſtand an equality of compenſation. With ſuch men, all laws giving a higher ſalary to a preſident of the United States, than to a footman; to a member of congreſs, than to a door-keeper; to a judge, than to a conſtable; to a painter or clockmaker, than to a day-labourer; will be conſidered as infringements of the rights of man. Thus all arts, ſciences, and manufactures, would be at an end; for there would be no motive to improvement.

On principles, like theſe, every act of the government may be examined and condemned. And, on ſuch principles, what government could ſtand?

If all men be equal, what better, it will be ſaid, is an officer, than an individual, or an act of the legiſlature, than a reſolution of a club? Thus public authority will be brought down to the common level, deſpiſed, oppoſed, and deſtroyed.

If all men be equal, why may not the moſt ignorant and worthleſs citizen be liſtened to and followed, as well as the moſt intelligent and worthy; or a man without any ſenſe or knowledge be a judge or a legiſlator, as well as a man who has ſpent his life in the ſtudy of the ſcience of law and government? Thus all offices of government are thrown open to the ambition of all the citizens. Multiplied and endleſs jealouſies, rivalſhips, calumnies, and reſentments, are produced and foſtered. Private and public characters and tranſactions are miſ-

Dec. Sess. 1797. repreſented. Social and domeſtic peace is ſacrificed to the envious and malignant views of baſe men. And quiet and happineſs are deſtroyed.

Extravagant as theſe ſuppoſitions may ſeem, they are not unnatural; nay, we ſee them all carried into full operation every day. We ſee ignorant and worthleſs men court and acquire influence and popularity, aſpire to office, ſucceed in elections and appointments, and fill important ſtations in the government. We ſee no eminence, no character, no merit, no meaſure, ſafe from ignorant, impudent, and malicious attack and miſrepreſentation. Of the permanence of a government thus corrupted in its ſource, and obſtructed in its operation, what confidence can be entertained? And with the principles of liberty and equality, abſtract and undefined, declared as the univerſal rights of man, will it not be difficult to maintain the ſubordination and economy of domeſtic life? Will not the ſon ſuppoſe himſelf equal to the father, the ſervant to the maſter? And, with ſuch ideas, can there be any diſcipline of authority, any ſenſe of filial duty, or any obligations of obedience?—And, without theſe, can there be any ſocial happineſs or improvement?

If we have founded a government, in the hands of the whole people, on the principles of liberty and equality, ſupported neither by opinion or imagination (ſo efficacious in the government of man) nor by force; if, with no ranks or orders in our ſociety, with no pomp or ſplendour in public ſtations, with no religion or inſtruction at public expence, with no public force to ſecure obedience, we have founded our hopes of ſubmiſſion to authority, on reſpect for the law, the influence of reaſon, and a regard for duty; we muſt counteract the tendency to decay and diſſolution inſeparable from every ſuch government, by artificial remedies, or by a virtuous, rational, and enlightened operation of the principles of our conſtitution.

If the people will be free and equal, if they will have an agency in the adminiſtration of the government, they muſt ſhake off ignorance and prejudice, they muſt be wiſe, they muſt be modeſt, they muſt reſpect virtue, knowledge, and the laws.

It is impoſſible, that a whole people can underſtand

the ſcience of government. It is impoſſible, that they ſhould be qualified to judge in many matters, on which they are called to act. In ſuch caſes, what muſt they do, if they poſſeſs not knowledge to act, and are yet bound to act with knowledge? Let them not, becauſe they have the power, make it a point of vanity or pride, to do what they pleaſe, whether right or wrong; but let it be their pride, to do what is right. Let them reflect; let them enquire; and let them ſeek information not from the ignorant, but from the wiſe. This is what we do in all our private or common concerns of life. We never go to a phyſician, for advice in a law-ſuit; nor to a lawyer, for counſel in a fever. We do not conſult a merchant, on the beſt method of cultivating a field; nor a farmer, in a point of divinity. But every man is truſted in his own profeſſion: and things are well managed, only when they are ſubmitted to the direction of thoſe who underſtand them. *Dec. Seſſ.* 1797.

Without the influence of reſpect upon them, the people can neither be guided nor governed. Authority is too abſtract an idea, to be the only object of reſpect.—There muſt be intermediate and viſible objects, to impreſs the ſenſes, and influence the mind to obedience. We have no artificial ranks or orders of men, to attach reſpect; and, for the efficacy of our government, and the peace of ſociety, the people muſt feel and maintain, here, for the natural ariſtocracy of wiſdom and virtue, that reſpect, which, in other countries, is felt and maintained for the artificial ariſtocracy of order and rank. By this reſpect, the peace of ſociety, and the order of government, may be preſerved, true liberty and true equality, in the balance of wiſdom againſt numbers, may be ſupported, and the happineſs of the whole people ſecured. Without it, ignorance will make itſelf equal to knowledge, folly to wiſdom, raſhneſs to prudence, and vice to virtue. All things will be jumbled together, like the chaos of matter, before the Almighty called every particle and element to its place, directed their motions, and marſhalled them into order.

The people muſt be inſtructed. Public inſtitutions for the education of youth muſt be eſtabliſhed. Knowledge of the limits of freedom, and of the nature and

Dec. S.ff. 1797. extent of duty muſt be diffuſed. That the number of ignorant men having an agency in the government may, as much as poſſible be diminiſhed, ignorance muſt, as much as poſſible be removed. And, that public affairs may be well conducted, and fairly examined, learning and knowledge muſt be ſpread among the people.

To the light of knowledge muſt be added the influence of religion. The ſenſe of duty muſt be ſtrengthened by the impreſſions of piety, the belief of divine Providence, and the faith of a future ſtate. Thus the whole power of imagination, and all the ſanctions of the divine law will co-operate with the dictates of knowledge and reaſon, and promote the practice of duty. A free nation of atheiſts, and of ignorant atheiſts, is a dreadful ſpectacle. And what but this is to be looked for, of a nation without public inſtitutions for promoting learning and piety?

Public officers muſt be reſpected, as the organs of public authority. In proportion to the importance and dignity of their ſtations, muſt be the reſpect for their perſons, and the ſubmiſſion to their authority. And in devoting to them this reſpect, it is not ſo much given to them, as to the efficacy of the government, the peace and order of ſociety, and our own intereſt and happineſs.

The laws and conſtitution of our government ought to be regarded with reverence. Man muſt have an idol. And our political idol ought to be our conſtitution and laws. Theſe, like the ark of the covenant among the Jews, ought to be ſacred from all profane touch. If we would preſerve our government uncorrupted, and promote our own peace and happineſs, we muſt reverence the laws, and every lawful act and ordinance of our adminiſtration. If we will have a rational government on the baſis of liberty and equality, the people muſt themſelves be rational, enlightened, wiſe, and virtuous; they muſt be modeſt, and willing to learn from true ſources; they muſt be reſpectful of underſtanding, wiſdom, and experience; and they muſt ceaſe to liſten to ignorance, folly, and flattery.

If ſuch ſhall be the mind and conduct of the people, our government may, as far as any human work of the kind can, be perpetual. But if ſuch be not the mind and conduct of the people, our government will be in-

efficient, while it lasts, and will fall by our own hands. A democratic government, among a people without knowledge and virtue, is a political absurdity: it is a government of ignorance and vice; and Providence can never smile on it, nor long endure it. *Dec Sess. 1797.*

But alas! I exhort in vain. It is too little in the nature of man, to succeed in the hope of general reformation. A people is reformed only by calamity.—Cassandra prophesied, in vain, to the Trojans: and they rejected her counsels, to avert the destruction of Troy. The prophets sent by God to the Jews, to warn them of their errors and their ruin, were disbelieved, despised, hated, and slain; till their city was made desolate, and the people led into captivity. The Son of God himself, in vain, mourned over their folly and unbelief, in vain, exhorted them to virtue and wisdom, in vain, warned them of their calamity; he was held as an impostor, a false teacher, and a sorcerer; and their name was blotted out from among the nations.

That you, however, a select body of the people, called out on this jury, to execute a particular and important public duty, will discharge your trust, with that vigilance and respect for the laws, which a regard to the peace of society, and the energy of the government, demands; I confidently expect, and firmly believe; and to this discharge I shall heartily contribute, the aid of professional principles and experience.

No. XXIII.

Qualifications of Electors.

IN a representative government, composed of several branches, to each of which distinct portions of the general authority is committed, it is essential, that the constitutional authority of each be free from all control, check, or influence out of itself. Within itself alone must each branch find the motives of its action. For, if any external impulse or interference affect it, *March Sessions, 1798.*

March Sess. 1798

that part of the government is no longer exercised by the constitutional branch, but by that and some other. Power becomes usurped by those exercising it without constitutional authority, and the government is changed and corrupted.

Of all the branches of administration the importance of none is less justly estimated, than of the elective branch. That which possesses the power of all appointment must necessarily influence the whole of the administration. It is of the greatest moment therefore, that the power of election be preserved from impure or improper hands, and be exercised with integrity and wisdom.

A great and important share of the elective authority is in the hands of the people. It is therefore essential, that it be ascertained who are the people: for if any not of the people interfere in the exercise of the elective authority, power is usurped, the constitution and administration of the government is violated, in the same manner as if any other public trust, office, or duty is exercised by any not lawfully appointed to it.

In the United States it is, more than in any other nation, important, that it be well ascertained, who are the people. For in this, more than in any other nation, there is a vast concourse of strangers from different parts of the world, of a great variety of habits, manners, principles, opinions, and prejudices: some, like birds of passage, to seek in this country only a temporary residence; and others to find in it an habitation and a grave for themselves and their posterity.

At this time too, the number of such has been unusually great. The revolution in France, the commotions in other parts of Europe, and the insurrections in the West-Indies, have driven vast multitudes of all characters and colours, to seek, in the United States, a refuge from punishment, calamity, or misery. How could our government prosper, were all such strangers suddenly to be admitted to act upon it! Time must be taken for examination of their dispositions and conduct, and for their instruction in the nature of our interests and duties, and a just discrimination and selection must be made, before strangers, by being admitted into the number of the people, can be suffered to share in the administration of our government.

The conſtitution of Pennſylvania, as it defines and arranges the other branches of the government of this ſtate, defines alſo the people, or that part of the elective branch which is compoſed of the citizens in their individual capacity. It declares, that, "in elections by the citizens, every free man of the age of twenty-one years, having reſided in this ſtate two years next before the election, and, within that time, paid a ſtate or county tax, which ſhall have been aſſeſſed at leaſt ſix months before the election, ſhall enjoy the rights of an elector; provided, that the ſons of perſons qualified as aforeſaid between the age of twenty-one and twenty-two years, ſhall be entitled to vote, although they ſhall not have paid taxes." *March Seſſ.* 1798.

The conſtitution of the United States directs, that the members of the houſe of repreſentatives of congreſs ſhall be choſen by the people of the ſeveral ſtates qualified as electors of the moſt numerous branch of the ſtate legiſlature; and the electors of the preſident and vice-preſident of the United States, ſhall be appointed in each ſtate, in ſuch manner as the legiſlature thereof may direct. The legiſlature of this ſtate has directed, that the electors in this ſtate for chooſing a preſident and vice-preſident of the United States ſhall be choſen by the citizens qualified to vote for members of the general aſſembly. So that all popular elections in this ſtate are regulated by the principles of the ſtate conſtitution.

All laws relative to elections, as affecting the vital principles of our government, ought to be ſacredly reſpected, and ſtrictly executed. And the rights of electors, like the prerogatives of ſovereignty, ought to be guarded from encroachment by the uſurpation of unqualified perſons. I ſhall therefore here give a detailed view of the qualifications of an elector, as preſcribed by our conſtitution and laws.

The qualifications of electors are five;—1ſt. Age, 2d. Freedom, 3d. Property, 4th. Reſidence, and 5th. Citizenſhip.

1. Our laws preſume, that infants, that is all perſons under the age of twenty-one years, want diſcretion to act for themſelves, and, therefore, generally declare

March Sess. 1798 the acts of such void. If they be incapable of judging in the management of their private concerns, they must also be incapable of judging in the management of public concerns; and are therefore excluded from voting at elections: for no man can vote, unless he be of the age of twenty-one years. This has always been the law of Pennsylvania.*

2. Not only discretion, or the right management of the judgment; but freedom of will is necessary for a just exertion. To discretion, therefore, must be added liberty of action; and an elector must not only be of age, but he must be free.

3. Property, together with discretion and freedom, is a necessary qualification of an elector.

By the laws agreed on in England, by the governor and freemen, in 1682, it was declared, that every inhabitant in the province that shall be a purchaser of one hundred acres of land, and every person who shall have paid his passage, and taken up one hundred acres of land at one penny an acre, and have cultivated ten acres thereof, and every person that hath been a servant or bondsman, and is free by his service, that shall have taken up his fifty acres of land, and cultivated twenty thereof, and every inhabitant, artificer, or other resident in the province that pays scot and lot to the government, shall be deemed a freeman of this province, and be capable of electing and being elected a representative of the people in the general assembly.†

By a law of 1705, it was declared, that no inhabitant shall have a right of electing or being elected, unless he be a freeholder, and have fifty acres of land well seated, and twelve thereof cleared and improved, or be otherwise worth fifty pounds clear estate ‡

The Pennsylvania constitution of 1776 declared, that all freemen, having a sufficient evident common interest with, and attachment to the community, have a right to elect officers, or be elected into office.§ And, with

* *Laws agreed on in Eng.* 1 *St. L. App.* 22. *Const. of* 1776, *c.* 2, *sect.* 6. *Const. Art.* 3, *sect.* 1.

† 1 *St. L. App* 22.

‡ 1 *St. L. O Ed* 36 203, 325.

§ *C.* 1, *sect.* 7. 1 *St. L. App.* 55.

respect to property, what is meant by common interest and attachment, as a qualification for voting is having, within one year next before the election paid public taxes.* *March Sess.* 1798.

The present constitution of this state declares it to be a necessary qualification of an elector, that he shall have within two years next before the election, paid a state or county tax assessed at least six months before the election.†

The constitution of 1776 having provided, that sons of freeholders of the age of twenty-one years, shall be entitled to vote, although they have not paid taxes;‡ the present constitution extends this privilege to the sons of qualified electors generally, but limits its operation to the year which elapses between the young man's arrival at the age of twenty-one, and his arrival at the age of twenty-two years:§ so that, if he be twenty-two years of age, he cannot vote, unless he be qualified by the payment of taxes. The reason of this provision perhaps is, that their fathers' property, while they are supposed to remain under his jurisdiction, is a common interest; and, as they are not liable to personal taxes, until they arrive at the age of twenty-one years, and as this may happen after an assessment, and before an election, an act of the law exempting them from taxes, shall not deprive them of the privilege of voting, till this exemption ceases, and, within another year, they have an opportunity of being assessed and paying taxes.

On this principle, it was declared, by the election law of 1786, that no minister of the gospel, mechanic, manufacturer, or schoolmaster, shall be considered as disqualified from giving their votes at any general election, on account of any exemption from taxes imposed by the funding law of this state.‖ But as these taxes no longer subsist, the exemption and exception ceases of course.

It is clear that the qualification of payment of taxes is here required as an evidence of property, or interest

* *C.* 2, *sect.* 6. 1 *St. L. App.* 56.
† *Art.* 3, *sect.* 1.
‡ *C.* 2. *sect.* 6.
§ *Art.* 3, *sect.* 1.
‖ 2 *St. L.* 461.

March Seff. 1798. in the community. A man therefore once qualified, in point of property, may loſe his qualification by loſing his property, for he muſt have paid taxes within two years next before the election.

But if, within that time, no taxes have been aſſeſſed, this is an exemption by act of the law, and ought not to operate as a diſqualification, provided there be evidence of taxable property and a faculty of paying taxes.

To prevent a colluſive payment of taxes, for the purpoſe of thereby acquiring a qualification, the taxes, the payment of which will be a qualification, muſt have been aſſeſſed ſix months before the election: and they muſt be either a ſtate or a county tax; for the payment of a townſhip tax is no qualification.

4. Reſidence within the ſtate is another qualification to entitle to vote, and is required probably to give the elector an opportunity of learning characters, intereſts, and duties. And, for the ſame reaſon, it muſt be a reſidence immediately before the election.*

By a law of 1705, it was enacted, that no inhabitant ſhall have a right of electing or being elected, unleſs he have been reſident within the province two years before the election.† And by a law of 1743, it was declared neceſſary, before a foreigner could become a citizen or ſubject, and, of courſe, before he could vote at any election, that he ſhould have inhabited ſeven years in this province, and not been abſent out of it, or ſome other of the colonies, longer than two months at one time during thoſe ſeven years.‡

By the Pennſylvania conſtitution of 1776, reſidence in the ſtate for the ſpace of one whole year, next before the day of election, was required as a neceſſary qualification of an elector.§ And, by the preſent conſtitution, which is the governing rule on this point, a reſidence in the ſtate two years next before the election, is required as a qualification.‖

Though the election laws, previous to the revolution,

* *Abſence occaſioned by public buſineſs of the United States or of this ſtate is no diſqualification for an appointment as a member of aſſembly. But there is no ſuch proviſion in favour of electors.*

† 1 *St. L. O Ed.* 36.
‡ 1 *St. L. App.* 46.
§ *C.* 2, *ſect.* 6, 42.
‖ *Art.* 3, *ſect.* 1.

diſtinguiſhed between natural born ſubjects and foreigners, by requiring from ſubjects, a reſidence of only two years,* and from foreigners a reſidence of ſeven years;† yet the Pennſylvania conſtitution of 1776, made no ſuch diſtinction, but required the ſame reſidence of one year from both. And though the preſent Pennſylvania conſtitution requires the ſame reſidence of two years, which was required before the revolution, and though it had been before ſtipulated by the articles of confederation, that *the free inhabitants*,‡ and by the conſtitution of the United States, that *the citizens* of each ſtate ſhall be entitled to all privileges and immunities in the ſeveral ſtates;§ yet the preſent Pennſylvania conſtitution has made no difference between a citizen of the United States coming from any other to reſide in this ſtate, and the ſubject of a foreign power coming to reſide in this ſtate, and requires indiſcriminately from all the ſame qualification of two years reſidence.‖ This injuſtice is now corrected by the naturalization law of the United States, which requires from aliens a reſidence of five years within the United States previous to admiſſion as citizens, and ſo brings back the qualification to nearly what it was in this ſtate before the revolution; except that then a reſidence of ſeven years, and now only of five years is required for admiſſion as a citizen. *March Seſſ.* 1798.

5. Citizenſhip is another qualification neceſſary in an elector.

All nations diſtinguiſh between their own citizens and foreigners reſiding among them. Citizens are either by birth or naturalization. Citizens by birth owe permanent allegiance, and poſſeſs correſpondent rights, from their nativity. Reſident foreigners do not owe permanent allegiance, nor poſſeſs any right of citizenſhip, until they take an oath of allegiance, and be naturalized or declared citizens.

Of all the rights of citizens none is more important, than that of election; and, in no country is that acquired ſo eaſily as in this country. But no foreigner can, or from its early ſettlement could, in Pennſylvania, acquire the rights of a citizen (eſpecially that of diſcharg-

* 1 *St. L. O. Ed.* 36. † 1 *St. L. App.* 46.
‡ *Art.* 4. § *Art.* 4, *ſect.* 2. ‖ *Art.* 3, *ſect.* 1.

March Seſſ. 1798.

ing the duty of an elector) till after he has taken an oath of allegiance, and been naturalized. He muſt owe permanent allegiance to ſome government; and he owes none to this, till he hath taken an oath of allegiance to it. He is an alien, and no citizen, till then. And, before that, to exerciſe any right of citizenſhip, is uſurpation of unlawful power. It is entering on an office, without taking the oath of office. Such has been the uniform law of Pennſylvania from its early times.

The laws agreed on in England, by the firſt adventurers into this colony, were framed between and for fellow ſubjects of the ſame king, who all, from birth, owed permanent allegiance to their ſovereign, and from whom no oath of allegiance was neceſſary. They were all natural born ſubjects, and no aliens. And they were not about to remove into the juriſdiction of a new ſovereign, but to remain under the ſame, in which they were born. From ſuch emigrants an oath of allegiance would have been ſuperfluous.

But as ſoon as the circumſtances of aliens becoming reſident in this colony was attended to, in the year 1700, a law was paſſed reciting, that ſome of the people living in, or likely to come into this province, are foreigners, and not freemen according to the acceptation of the laws, the conſequences of which might prove injurious to the proſperity of the province; and therefore empowering the governor, by inſtrument under the broad ſeal, to declare any alien ſettled within this government, having firſt made and given his ſolemn engagement to be true and faithful to the king and the governor, according to the laws and uſages thereof, before the governor, to be completely naturalized.*

In 1705, it was declared by law, that no inhabitant ſhall have a right of electing or being elected, unleſs he be a natural born ſubject of England, or naturalized there or here, and a freeholder, and have been reſident within this province two years before the election.†

In 1743, it was enacted, that all proteſtants born out of the king's liegiance, having inhabited ſeven years in this province, and not been abſent out of it or ſome other of the colonies, longer than two months at one time, du-

* 1 *St. L. App.* 35. † 1 *St. L. O. Ed.* 36.

ring the ſame ſeven years, who ſhall make and ſubſcribe the declaration of fidelity, and the profeſſion of Chriſtian belief, and take and affirm the effect of the abjuration oath, before any judge of the ſupreme court of this province, ſhall be deemed the king's natural born ſubjects.* *March Seſſ.* 1798.

By acts of aſſembly paſſed in 1746 and in 1766, election inſpectors were authoriſed to adminiſter an oath of his qualifications to any elector, and one of the qualifications to which any perſon coming forward as an elector, if a foreigner by birth, was required to ſwear, was, that he had been, in due form of law, naturalized; and the votes of thoſe who refuſed to take ſuch oath were to be rejected.†

So ſtood the law, when the declaration of independence proclaimed theſe colonies free and independent ſtates, abſolved them from all allegiance to the Britiſh crown, and totally diſſolved all political connection between them and the ſtate of Great Britain.

In conſequence of this declaration, all the natural born or naturalized ſubjects of Britain, then inhabitants of this ſtate, renounced their allegiance to Britain, and owed a permanent allegiance to the new government of this ſtate and the Union; "and they held all their Britiſh brethren out of theſe ſtates, as they held the reſt of mankind, enemies in war, in peace friends."‡ So that if any of the inhabitants of Britain or its dependencies, thereafter emigrated into the United States, they were to be received not as fellow citizens, but as aliens or foreigners; and all the laws applicable to foreigners, were to be applied to them.

The Pennſylvania conſtitution of 1776, in the 42d ſection of the plan of government, introduced a new rule, and declared, that every foreigner of good character, who comes to ſettle in this ſtate, having firſt taken an oath or affirmation of allegiance to the ſame, ſhall be deemed a free denizen thereof, and entitled to all the rights of a natural born ſubject of this ſtate, except that he ſhall not be capable of being elected a repreſentative unleſs after two years reſidence.§ And, in conformity to this, one of the teſt laws of 1778 declared ſtrangers

* 1 *St. L. App.* 46.
† 1 *St. L. O. Ed.* 37, 203, 325.
‡ 1 *St. L. App.* 53.
§ *C.* 2. *ſect.* 42.

March Seſſ. 1798. from beyond ſeas entitled to the privileges of freemen, on taking the preſcribed oath of allegiance before ſome juſtice of the peace.

But as all the citizens of the United States, at the time of the declaration of independence, had been ſubjects of a foreign power, it was thought neceſſary to exact from them a declaration of their allegiance to the new government. By various laws, paſſed in 1777, 1778, and 1779, all male white inhabitants above the age of eighteen, were directed to take an oath of allegiance to this commonwealth. And, by a law of 1777, every perſon coming to vote for members of aſſembly, was required to produce a certificate of his having taken the oath of allegiance, and, unleſs he did produce ſuch certificate, or then take ſuch oath, the inſpector was forbidden to receive his vote.* A ſimilar proviſion was made by the election law of 1785, which enacts that no male white inhabitant of this ſtate, reſident therein, and above the age of eighteen on the 1ſt of October 1779, ſhall be admitted to vote at an election, who hath not taken the oath of allegiance and abjuration within the time limited by the act of that date, or, if he was then under the age of eighteen, and hath ſince attained his full age, if he have not taken ſuch oath, and do not produce a certificate thereof, or if his certificate be loſt, make oath or affirmation of his having taken the ſame; and no man who hath removed to this ſtate from ſome other of the United States of America, ſince the ſaid 1ſt of October, though he have brought with him a certificate of his taking the oath of allegiance to the ſtate whence he removed; nor any ſtranger from foreign parts, who has come into this ſtate, although he have reſided therein one full year, ſhall be admitted to vote at ſuch election, unleſs he produce to the proper inſpector an authentic certificate of his having taken the oath of allegiance. And it is part of the oath preſcribed by the ſame law to the inſpector, that he will not receive any vote from any elector, until he produce a certificate or other ſufficient proof of his having taken an oath of allegiance to this commonwealth.† So the law yet remains, as to all ſtrangers from foreign parts,

* 2 *St. L. O. Ed.* 72. † 2 *St. L.* 348, 353.

who have emigrated into this ſtate ſince the declaration of independence. But with reſpect to thoſe who, at the time of the declaration of independence, were ſubjects or inhabitants of this ſtate, a law paſſed in 1789, reciting that oaths or affirmations of allegiance, abjuration and fidelity, from time to time required of the citizens of this commonwealth, however proper and expedient, during the late war, when it was neceſſary for individuals to teſtify their attachment to one or other of the contending parties, ſince the reſtoration of peace, and the eſtabliſhment of government, have become unneceſſary; declares that all acts, which require any oath or affirmation of allegiance or fidelity to this commonwealth from the ſubjects or inhabitants thereof, or of abjuration or renunciation of any foreign power, or which impoſes any penalty or diſability on any perſon or perſons for having refuſed or neglected to take ſuch oath or affirmation, are repealed; and that all perſons who from not having taken the ſaid oath or affirmation, were, by force and operation of the acts of aſſembly relating thereto, excluded from certain privileges, ſhall be placed on the ſame footing with the other citizens. The ſame law, however, provides, that nothing therein contained ſhall alter or affect the 42d ſection of the plan of government of this commonwealth; and proceeds to preſcribe the form of the oath or affirmation of allegiance, which (the laws preſcribing the form being thus repealed) ſhall thereafter be taken by every ſuch foreigner, as is in the ſaid ſection mentioned.* *March Seſſ.* 1798.

What effect will this law have on the election law of 1785? This law of 1785 requires evidence of an oath of allegiance from three kinds of perſons before they are permitted to vote; 1ſt. from all citizens of this ſtate, though born here, or reſident here, at the time of the declaration of independence; 2d. from thoſe who have removed into this, from any other of the United States, though they have taken an oath of allegiance to any ſuch other ſtate; and 3d. from all ſtrangers from foreign parts. With reſpect to the firſt kind of citizens, the law of 1789 removes the neceſſity of any evidence of an oath of allegiance. With reſpect to the ſecond kind, citizens of other ſtates, removed and reſident in this ſtate, the eſta-

* 2 *St. L.* 676.

March Sess. 1798.

bliſhment of the conſtitution of the United States ſeems to require, that the ſame exemption from any ſuch neceſſity ſhould be extended to them. But with reſpect to the third kind, ſtrangers from foreign parts, the nature of the caſe, the conſtitution of 1776, and the law itſelf, ſhew, that it could not be, and was not intended to exempt them from the obligation of an oath of allegiance.

It is evident, therefore, that this law repealed only thoſe acts which impoſed an oath, as a teſt whether citizens of this ſtate adhered to the United States or to their enemies; and, of courſe, relieved from the diſabilities of thoſe laws only natural born or naturalized citizens, all who were citizens at the time of the declaration of independence, or had been born here ſince; and did not alter the condition of any who, ſince the declaration of independence, had removed from foreign parts into this ſtate. The object of the teſt laws was to diſqualify what were called *tory* citizens; the object of this repealing law was to remove that diſqualification. It was the intention of this law to remove the diſtinction not between citizens and aliens, but between citizens and citizens; to qualify *tory* citizens, not to *naturalize* aliens; to repeal the teſt laws, not the naturalization law. The law of naturalization was eſtabliſhed by the conſtitution; which the aſſembly, while they knew they had not the power, declared they had not the will, to alter or affect. The rule of the conſtitution did not, in conſequence of this law, ceaſe to affect all foreigners coming into this ſtate, ſince the declaration of independence. The teſt laws, while they exiſted, anſwered the double purpoſe of a teſt of the allegiance of the citizens of this ſtate, in their choice of ſides between the United States and Britain, and, in purſuance of the conſtitution, a declaration of the allegiance of foreigners when naturalized. And this law, which repealed the teſt laws, preſcribed, in purſuance of the conſtitution, a form of declaration of allegiance by foreigners, when thereafter to be naturalized. And by this form, all foreigners, who ſince the declaration of independence, had come into this ſtate, were, in purſuance of the conſtitution, thereafter to be naturalized; until congreſs ſhould eſtabliſh an uniform rule of naturalization throughout the United States.

For the conſtitution of the United States, in order to form a more perfect Union, preſented to foreign nations, not thirteen ſeveral ſovereignties, but one general ſovereignty, and veſted congreſs with power "to eſtabliſh an uniform rule of naturalization, throughout the United States."* This power congreſs did not execute, till the 26th March, 1790, when it empowered any common law court of record, in any one of the ſtates, on the application of any perſon of good character, reſident therein for one year, and within the United States for two years, to adminiſter to him the oath or affirmation preſcribed by law, and record the application and proceedings, and thereupon he was declared to be a citizen.† But this law congreſs afterwards repealed by a law of 29th January, 1795, which directed the only form which now exiſts, of admitting any alien to become a citizen of the United States.‡ *March Seſſ.* 1798.

By that law,—1ſt. The alien intending to become a citizen, muſt three years at leaſt before his admiſſion,§ declare, on oath or affirmation, before the ſupreme, ſuperior, diſtrict, or circuit court, of ſome one of the ſtates, or of the territories north-weſt or ſouth of the river Ohio, or a circuit, or diſtrict court of the United States, that it is his intention to become a citizen of the United States, and to renounce forever all foreign allegiance.—2d. When applying for admiſſion, he muſt declare, on oath or affirmation, before ſome one of the courts aforeſaid, that he has reſided within the United States five years at leaſt,§ and within the ſtate or territory, where ſuch court is held, one year at leaſt, that he will ſupport the conſtitution of the United States, and doth renounce all foreign allegiance.—3d. The court muſt be ſatisfied, that he has reſided within the limits, and under the juriſdiction, of the United States, five years, and that, during that time, he has been of good moral character, attached to the principles of the conſtitution, and well diſpoſed to the good order and happineſs of the United States.—4th. If he have borne any order of nobility, he ſhall expreſſly renounce his title.

* *Art.* 1, *ſect.* 8. † 1 *U. S. L.* 133.
‡ 3 *U. S. L.* 172. § *See poſtſcript annexed to this.*

March Seſſ. 1798.

Theſe are the terms, on which aliens coming into the United States, after the date of the law, are to be admitted to become citizens. With reſpect to any alien reſiding, at the date of the law, within the limits and juriſdiction of the United States, he may be admitted to become a citizen, on his declaring, on oath or affirmation, in ſome one of the courts aforeſaid, that he has reſided, two years at leaſt, within the juriſdiction of the ſame, and one year at leaſt, within the ſtate or territory where ſuch court is held; that he will ſupport the conſtitution of the United States, and abjures all foreign allegiance; and the court being ſatisfied, that, during the ſaid term of two years, he has been of a good moral character, attached to the conſtitution, and well diſpoſed to the good order and happineſs of the United States; and, if he have borne any hereditary title, or been of any of the orders of nobility, on renouncing his title, he ſhall be entitled to admiſſion as a citizen.

Both theſe laws provide, that the children of perſons duly naturalized, dwelling within the United States, and under the age of twenty-one years, at the time of ſuch naturalization; and the children of citizens of the United States born out of the juriſdiction of the United States, ſhall be conſidered as citizens of the United States. But the right of citizenſhip ſhall not deſcend to perſons, whoſe fathers never have been reſident within the United States.

It is evident, that, ſince the 26th of March, 1790, when congreſs firſt exerciſed its conſtitutional authority of eſtabliſhing an uniform rule of naturalization, the naturalization laws of every ſtate abſolutely ceaſed.—For, if they could exiſt together with the law of congreſs, the end of the conſtitution, an uniform rule of naturalization, would be defeated. If by the law of any individual ſtate, an alien could become a citizen of that ſtate, he would, of courſe, by virtue of that clauſe of the United States conſtitution, which gives to citizens of each ſtate all privileges and immunities of citizens in the ſeveral ſtates,* become a citizen of every ſtate, that is of the United States, without conforming to the law of the United States. And if, by thus becoming a citi-

* *Art.* 4, *ſect.* 2.

zen of a ſtate, he could be qualified to vote for the moſt numerous branch of the ſtate legiſlature, he would, of courſe, by virtue of that clauſe of the United States conſtitution, which declares by whom the houſe of repreſentatives of the United States ſhall be choſen,* be alſo qualified to vote for members of the houſe of repreſentatives of the United States. So that all principles on this ſubject would be confounded. *March Seſſ.* 1798.

On this ground, the preſent conſtitution of Pennſylvania, though it does not repeal the 4th ſection of the act of aſſembly of 1789,† which was ſuperſeded by the act of congreſs of 1790, did not, like the Pennſylvania conſtitution of 1776, adopt any rule of naturalization; becauſe the conſtitution of the United States had before veſted in congreſs the power of naturalization, and they had executed that power.

It is now, therefore, not proper to ſay, that an alien has become a citizen of a particular ſtate, but that he has become a citizen of the United States; and it is only on the terms of the law of the United States, that aliens can become citizens in any ſtate.

In no country, are ſo important privileges ſo eaſily offered to all men of good character. That aliens, before they are admitted to theſe privileges, ſhould be known to deſerve them, and to be permanently attached to this country, its eſſential intereſts require. Every petty corporation preſcribes certain terms of admiſſion to its rights. Even a free maſon ſociety has ſolemnities of admiſſion. And ſhall then no formalities, and inveſtigation of character and intention precede admiſſion to the high privileges of a citizen of a ſovereign republic?

We ſee then, that, to qualify a man to vote at any election, all theſe circumſtances muſt concur. He muſt be of the age of twenty-one years, free, and a citizen; he muſt have reſided in this ſtate two years next before the election; and, within that time, he muſt have paid a ſtate or county tax, aſſeſſed at leaſt ſix months before the election.

Waving, however, at this time, the mature conſideration of theſe principles; and reſerving, for the time when

* *Art.* 1, *ſect.* 2. † 2 *St. L.* 677.

March Seff. 1798. it will be our immediate duty to act on them, their full operation on our minds; let us proceed to enquire into the offences, by which the peace of the ſtate has been diſturbed in this county.

POSTSCRIPT.

By a law of congreſs ſince paſſed, on the 18th of June 1798, ſupplementary to the law of 29th January, 1795, the terms of naturalization are again altered. The alien muſt now, in the manner before preſcribed, declare his intention to become a citizen, five years at leaſt before his admiſſion, and muſt, at the time of his application for admiſſion, declare and prove, to the ſatisfaction of the court having juriſdiction in the caſe, that he has reſided within the United States fourteen years at leaſt, and within the ſtate or territory where ſuch court is held five years at leaſt; beſides conforming to the other declarations, renunciations, and proofs by the former act required. Any alien, who was reſident within the limits and juriſdiction of the United States, before the 29th January 1795, may within one year after the paſſing of this act; and any alien, who has made the declaration of his intention to become a citizen, in conformity to the proviſions of the act of 29th January 1795, may, within four years after having made the declaration aforeſaid, be admitted to become a citizen, in the manner preſcribed by that act. But no alien, who is a native, citizen, denizen, or ſubject of any nation or ſtate with whom the United States are at war, at the time of his application, ſhall be, then, admitted to become a citizen of the United States.

This law alſo requires a regiſtry of aliens reſident or arriving in the United States. And, with reſpect to aliens arriving in the United States after the date of the law, the date of the regiſtry is to be conſidered as the commencement of their reſidence; and a certificate of the regiſtry, in proof of the term of reſidence, muſt be produced to the court to which application for admiſſion is made.

Though the words in the former and preſent conſtitution of this ſtate are poſitive and not excluſive, yet, in deſcribing the qualifications of electors, I have uſed ex-

eluſive words; becauſe the legiſlature had made no exceptions, but as I have ſtated, from the qualifications ſtated in the conſtitution; and becauſe the election law of 1785 had, in ſome caſes, uſed excluſive words. *March Seſſ.* 1798.

But the election law of 15th February 1799, having adopted this conſtruction, has left no room for doubt.—By this law it is declared, "that *no* perſon ſhall be admitted to vote at any general or ſpecial election or for inſpectors," other than thoſe qualified in the terms of the conſtitution.

This law declares that every perſon claiming to vote ſhall make due proof; 1. That he is a natural born citizen of this ſtate, or was ſettled therein on 28th September 1776; or, having been a foreigner, who ſince that time came to ſettle therein, that he hath taken an oath or affirmation of allegiance to the ſame on or before the 26th March 1790, or been naturalized conformably to the laws of the United States ſince that time. Or 2, That he is a natural born citizen of ſome other of the United States, or has been lawfully admitted or recogniſed as a citizen of ſome one of the ſaid ſtates, on or before the 26th March 1790, or of the United States ſince that time. The proof to be required of this qualification, is alſo preſcribed by this law. If the perſon claim to vote as a natural born citizen of this, or any other ſtate, or as reſident in this ſtate on 28th September 1776, the evidence to be given of this is his own oath or affirmation. If he claim as having taken an oath or affirmation of allegiance to this ſtate, or as having been lawfully admitted or recogniſed as a citizen of ſome other of the United States, on or before 26th March 1790, the evidence is a certificate from ſome judge, prothonotary, or clerk of a court, mayor, alderman, recorder, or juſtice of the peace, or his own oath or affirmation. If he claim as having been naturaliſed or admitted a citizen of the United States, the evidence is a certificate under the ſeal of the court wherein ſuch naturalization took place conformably to the laws of the United States.

No. XXIV.

Experiment the true ſource of knowledge; and that is the beſt Government, which beſt ſecures ſocial and domeſtic happineſs.

June Seſſions. 1798.

IT is only in mathematical ſcience that abſolute certainty is attainable. In other parts of human knowledge, our belief is founded on probability, more or leſs ſtrong, according to the extent of experience from which the probability has been deduced.

It is by means of experiment, that ſcience has been uſefully cultivated, and ſcientific truth diſcovered.—While men reſted their opinion on theories and ſyſtems, how wild were their errors, and how ridiculous their knowledge! In aſtronomy, and in all the parts of natural philoſophy, what ſtrange abſurdities were received, as maxims of ſcience and principles of doctrine! Every new ſyſtem was but a new variety of deluſion. And, while the only avenue that leads to ſcientific light remained unexplored, mankind was doomed to wander in darkneſs. To eat his bread by the ſweat of his brow is not more the doom of man, than to be wiſe only by experience.

In proportion to their error was their preſumption. Every ſyſtem-maker delivered his doctrines with the confidence of authority. As it reſted only on imagination, it could as well comprehend all, as any part of nature. All knowledge was ſuppoſed to be attained; and the fiction of fancy was received as the revelation of God.

Since a Bacon pointed out, and a Newton explored, the way to knowledge in natural philoſophy by experiment, its various branches have been cultivated by patient and judicious experiments of ingenious men. Diſcarding all ſyſtems and theories, and ſetting out in purſuit of truth as if they knew nothing, they purſue her ſtep by ſtep; and, as they diſcern their ignorance, they abandon their preſumption. But, though their progreſs be thus limited, it is ſure; nature, not fancy, is their guide; and if they carefully follow her, they will be led ſtraightly,

though ſlowly, on. Whatever be the walk which he may chooſe, it is but ſeldom, that the life of one enquirer ſuffices to conduct him to its end. But another ſtarts, where he ſtopt; and the end is reached at laſt. Even metaphyſics, of all ſciences the moſt ſubject to uncertainty, becauſe the leaſt ſubject to experiment, when traced, as nearly on the principles of experiment, as the ſcience will admit, begin to reflect the beams of the riſing ſun. A Reid, and a Stewart, attending leſs to the deluſions of fancy, than the patient inveſtigation of truth, have deduced principles, on which the mind ſeems to reſt with confidence. *June Seſſ.* 1798.

It ſeems ſtrange, that in an age when experiment is conſidered as the only road to knowledge, and when all other ſciences are cultivated by means of experiment, there is one ſcience, originally drawn rather from practice than theory, in which the reſult of experiment ſeems to be abandoned, and theory and ſyſtem ſubſtituted as the foundation of knowledge. Government has often, or generally, been founded by accident, and corrected by experience of its defects. The ſcience of government has been derived from obſervation of its origin, progreſs, and decay. Hiſtory is the record of experiments made in this ſcience, and is, therefore, the true ſource of knowledge of it, and the beſt guide for inſtruction. Yet now all paſt experience ſeems to be diſregarded, and all attention to practical conſequences laid aſide. A new ſyſtem of politics is deviſed, as the perfection of this ſcience; and, without conſulting the nature of man, or the record of experiments in government, (the only ſource of juſt knowledge,) philoſophers and reformers have raiſed a ſyſtem of political ſcience on abſtract principles, liberty, equality, and the rights of man. And thoſe abſtract principles, without reſpecting the differences in character, knowledge, and ſtate of ſociety, they adopt indiſcriminately, as the proper baſis of government in all countries.

That equality is a proper meaſure for the diſtribution of power, or that an uniform meaſure for the diſtribution of power is proper for all countries, may or may not be true, according to circumſtances. It is proper to diſtribute power according to capacity to uſe it, or

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temptation to its abuſe. In ſome countries, men in general, and, in all countries, ſome men, are incompetent for the right exerciſe of power, or will certainly abuſe it. That power may be uſeful, it muſt be diſtributed into the hands beſt qualified to exerciſe it. And to juſtify an equal diſtribution of it, as an abſtract and univerſal principle, there ought to be an equality of ſkill, capacity, and virtue. Without this, equality of power may, in the language of ſcripture, be *a price put into the hands of fools.*

Mr. Burke has expreſſed an idea, which ſeems very juſt, and deſerves attention. I do not recollect his expreſſions, nor his idea accurately. In ſpeaking of the ſentiments of the people of England on a political ſubject, he reckons only thoſe who have a will of their own, and are capable of forming a judgment of the ſubject; and, I think, he reckons them about the one eighth of the whole. Therefore, and juſtly, he prefers the opinion of this one eighth to that of the other ſeven eighths, and conſiders it as the real opinion of the people. Number of opinions is certainly a very inadequate ſcale, by which to meaſure truth. And reſpect for the decision of a majority will always be in proportion to the comparative and real degree of their capacity and impartiality. Becauſe all have a right to vote, we cannot, therefore, conclude, that the majority makes the beſt choice, unleſs we alſo know, that they, or a greater number of them than the minority, are more capable of chooſing than the minority. The choice, whether beſt or not, is legal, and muſt be reſpected, as ſtamped with public authority. But public authority cannot change the nature of things. It is common to ſay, that the people always *think* right. It ſeems more juſt to ſay, that the people always *feel* right. The people often think not at all, they often think wrong, from ignorance, prejudice, and miſinformation; and perhaps they do not often think right, till the ſubject has been ſubmitted, not only to their reflection, but to their feeling. This is meant of the people in the common ſenſe, the whole people. According to Mr. Burke's idea, conſidering, as the people, only thoſe who have freedom of will, and capacity of mind to form a judgment on any ſubject, in the opinion of this people, we have reaſon to confide, as

generally at leaſt, if not always right. It is the beſt ſtandard of truth, that we have to appeal to, and, as the voice of reaſon and underſtanding, it is the voice of nature or of God. But wherever, in taking the opinion of the people, you go beyond this number, your confidence muſt be diminiſhed, in proportion to the number of falſe judgments mingled with true; as gold is adulterated by the mixture of alloy. *June Sess.* 1798.

True practical civil liberty is a government of uſeful laws. Where the laws are uſeful, and are univerſally ſubmitted to, there is true practical civil liberty. It is of no practical importance, whether thoſe laws be made by one, or by the whole people: provided he or they who make them, underſtand the intereſts of the whole people, and the means of promoting thoſe intereſts, and zealouſly exert thoſe means. In the debates in the Britiſh houſe of commons, on a motion for a reform of parliament, it was aſked, whether the intereſts of Manchester, and other large towns, which had no repreſentation, were leſs attended to in that houſe, than the intereſts of towns which choſe repreſentatives. If good laws be made, of what practical conſequence is it to the people, that they do not make the laws, or have no right to chooſe the makers of the laws? Of what practical uſe is it, provided the laws are good, that I have a right to aſſemble at the place of election, to vote for men whom perhaps I do not know, to make laws on ſubjects which I do not underſtand. If the laws be good, and well executed, the people are free, and a people may be free, though they have no ſhare nor influence in the adminiſtration of the government.

Mr. Burke's natural repreſentation of the people, the intelligent, virtuous, and independent part of the community, or ſome abſtract of that, poſſeſſing the greateſt degree of intelligence, virtue, and independence, is certainly the beſt depoſitary of public authority. Giving to any part of the community, other than this natural repreſentation, any authority or influence, in the government, is practically corrupting the ſyſtem, in proportion to the quantity of ignorance, vice, or weakneſs, that you thus veſt with authority. It is giving to folly or wickedneſs, a check or predominancy over wiſdom and

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virtue ; and it is therefore reverſing the order of nature, and the inſtitutions of God. God hath made men different in powers, and it is in vain for human inſtitutions to attempt to make them equal.

To have true practical liberty, the laws ought to be made by thoſe who poſſeſs the higheſt degree of virtue and underſtanding, and, if made by choſen repreſentatives of the people, thoſe only ought to have power of chooſing, who are men of virtue and underſtanding.— This is the natural repreſentation of the people, and any artificial repreſentation, different from this, is, ſo far as it differs, a deviation from nature and reaſon.

The rights of man are various. The moſt eſſential are the right of acquiring and enjoying property, and of participating in the enjoyment of thoſe natural benefits, which are unſuſceptible of appropriation, as air and light; the right of perſonal liberty, the uſe of our corporeal faculties, unreſtrained by the force or fear of each other ; the right of liberty of thought and conſcience, the uſe of our mental faculties in deliberation and judgment.— Theſe, and all the rights of man, have their limits. The rights of each man muſt be ſo bounded, as not to encroach on thoſe of another. No man muſt be the judge of the extent of his own rights : this muſt be referred to the determination of the law, the voice of the community expreſſed by public authority. It is for the protection of theſe rights, that government is inſtituted, and wherever theſe are protected, and the people ſecured in the juſt enjoyment of them, there is true liberty and equality ; a liberty of doing what is right, and an equality of enjoying what we can lawfully acquire. Wherever theſe rights are protected by public authority, there is liberty, though the people ſhould have no ſhare in the government. And wherever theſe are not protected, there is ſlavery, though the whole government be in the hands of the people. It is not in authority, ſtation, or wealth, any more than in ſtature or complexion, that happineſs conſiſts. And though thoſe may be varied in infinite degrees, there may be equality of happineſs. It accords with the whole ſyſtem of nature, that thoſe ſhould be varied. And individuals differ from each other in happineſs, not according to the quantity of any of thoſe which they poſſeſs, but according to the manner in which

they enjoy what they poſſeſs. If you examine the different claſſes of civil ſociety, as diſtinguiſhed by thoſe circumſtances, you will find a difference of happineſs among the individuals of each claſs, but an equality of happineſs among the claſſes; and that, though all men be not, all ſtations are equally happy. Wherever thoſe rights of man, the right of property, the right of perſonal ſafety, and the right of conſcience, are protected by government, there civil, ſocial, and domeſtic happineſs is ſecured. And wherever civil, ſocial, and domeſtic happineſs is ſecured, the great purpoſe of government is accompliſhed, and true practical liberty is eſtabliſhed.

That liberty, or a government of uſeful laws, ſhould be beſt promoted by equality of power, is impoſſible;—ſo long as all men are not equally wiſe. Suppoſing them equal in virtue, it is clear, that this liberty can only be ſecured by veſting all the powers of government in only the wiſe men of the nation, and with-holding from the ignorant and fooliſh all authority and influence. This will be ſtill more neceſſary, if it be true (and I think experience will confirm it) that there is the beſt chance of finding moſt virtue, where there is moſt wiſdom. This diſtribution of power, however, is impracticable, from the difficulty of eſtabliſhing a ſtandard of wiſdom; and the right to authority or influence in the government muſt be aſcertained by ſome other criterion than wiſdom. But it is clear, that, in ſo far as any claim to power and influence, other than wiſdom and virtue, is adopted, the government is ſo far corrupted. And, in all countries, equality of power muſt introduce a greater or leſs degree of corruption in the government.

Equality, therefore, is not, of itſelf, a proper principle in the government, and is proper only with reſpect to ſomething elſe. While there are different degrees of underſtanding, equality of power muſt be an evil, and is admiſſible, as a principle of government, only with a view to avoid a greater evil. As all men are not equally wiſe, ſo neither are all men equally virtuous. Not, though there is the beſt chance of finding virtue, where there is wiſdom, is it certain, that wiſdom is always accompanied with virtue. To truſt, therefore, the intereſts of all into the hands of only ſome, however wiſe they

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may be, may perhaps not be ſafe, unleſs they be alſo virtuous. Therefore equality of power, though not juſtifiable on abſolute principles is admitted in ſome governments as a mean of preventing abuſe of power. It is one of thoſe remedies, which, in the imperfect ſtate of man, we apply to evils, which we cannot remove.

Yet, like many other remedies, it is too often ineffectual, and ſometimes even increaſes the danger, which it is intended to prevent. Survey the different governments in the world, and you will not find liberty, or uſeful laws, in proportion to the ſhare of power, which the people poſſeſs. In the moſt deſpotic countries, you will find the prince watching with reſtleſs ſolicitude for the good of his people, chooſing the wiſeſt miniſters, eſtabliſhing the moſt uſeful laws, foſtering ſciences, arts, agriculture, manufactures, and commerce; and, with true parental affection, like the father of a family, devoting his cares, his labours, and his life, to the welfare and happineſs of his people. And you will ſee the people in republics agitated with every violent and malignant paſſion, ſlaves to their vices, ſelling the public intereſts for money or pleaſure, deſtroying each other, hating and oppoſing the laws, proſtituting their rights to corruption and flattery; reviling good men, and conferring authority on the baſe and the ignorant. I ſhall not go to France for examples. Let us only review our own conduct, and ſee whether it be regulated by a regard for the public good; whether we do not often abuſe the power we poſſeſs; whether we do not encourage ſelfiſh, ſlanderous, and malevolent paſſions; whether we do not contemn authority, and whether we do not hate and oppoſe wiſe and good men, and exalt the fooliſh, the ignorant, and the flattering.

If this be the caſe, it may be much doubted, whether it be the intereſt of any nation, whatever be the form of its government, if the adminiſtration be generally uſeful, to encounter the hazards of a revolution, for the ſake of introducing equality, or any other of the fanciful rights of man: ſince all muſt depend on the adminiſtration, and the chance for a good adminiſtration ſeems little, if at all, improved by any abſtract principles. Theſe are indeed noble principles, and flattering to humanity; but ſtill they are abſtract; they are adapted to a ſtate of man

which has no exiſtence, a ſtate of univerſal knowledge, wiſdom, and virtue; and, like every theory not founded on truth, muſt be deluſive. Equality of power ought only to exiſt, where there is equality of mind. There it may be proper, be the qualities of mind good or bad. It may be a fit baſis, therefore, of a government for angels or devils, though not for the varied character of the human mind. *June Seſſ.* 1798.

Let us therefore beware of ſuppoſing, that equality is a complete ſecurity of true practical liberty, or uſeful laws. And let us not think, that, where equality does not exiſt, the people are, therefore, not free. Among a wiſe and virtuous people, equality will doubtleſs produce liberty or uſeful laws. But wiſdom and virtue in the adminiſtration of any form of government will do the ſame thing. And whatever be the form of government, if the laws be uſeful, if ſocial and domeſtic happineſs be promoted, if the rights of perſon, property, and opinion be ſecured, there is liberty. If ſuch laws be not made, ſuch happineſs be not promoted, and ſuch rights be not ſecured, whatever be the form of the government, there is no true liberty, there is ſlavery; and it is not leſs grievous, and it is more diſgraceful, if this ſlavery proceed from our own paſſions, than if it proceeded from the form of our government.

Let us abandon this method of learning the ſcience of government from abſtract principles, and artificial ſyſtems. Nothing but error and deluſion can be expected from a ſtudy of this kind. If we would be wiſe, in this, as in any other ſcience, we muſt learn from experience. Experiment is the only road to true knowledge. Study the nature of the human mind, paſſions, and conduct.—Conſult hiſtory and the records of experiment, and diſcard ſyſtems and theories.

Let us now proceed, with diligence and attention, to a conſcientious diſcharge of our preſent duties, and ſhew, by an intelligent and faithful exerciſe of our authority, that we deſerve to poſſeſs it.

The peace of the community requires, that all riot, tumult, and indecency ſhould be diſcountenanced, ſuppreſſed, and puniſhed.* Without the authority of go-

** This and all that follows, was delivered only at Waſhington, where the court was held on the laſt Monday of May 1798.*

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vernment to do this, men would degenerate to ruffians and savages. If any acts of this nature appear, it behooves magistrates, juries, and courts, instantly to apply their authority of coercion. If they happen in the night, when all quiet and orderly people are presumed to be enjoying the refreshment of sleep, to qualify themselves for the daily labours of honest and useful industry; it is more peculiarly incumbent on all persons vested with public authority, to exert their power for the restoration and preservation of peace, not only by removing the disturbance, but by bringing the offenders to punishment, as an example to deter from future offences. All such acts of violence done in a town become greater offences, in proportion to the number of peaceable citizens whom they molest. Government is bound to protect all orderly citizens, in the full enjoyment of peace and quiet. If such acts be done in a county town, at the seat of justice, it is an additional aggravation: for, under the immediate eye of public authority, peculiar decency and respect for the laws ought to prevail.

A disgraceful and disorderly breach of the peace was committed in this town, in the dead of night, between the last day of April and the first day of this month of May. A number of persons assembled about midnight, and between that and two of the clock in the morning, with great noise and tumult, to the disturbance of the neighbourhood, erected, in the street, a pole, which they called a may-pole, hung to it colours, and to them the French flag. To erect a pole in a street or high-way, at any time, is an offence, it is a public nuisance. To erect such pole, even on private ground, in a town, in the dead of night, with noise, and tumult disturbing the neighbourhood, is an offence, it is a public nuisance.—And for citizens of America, at this time, to hang to such pole, the flag of a nation, which, contrary to all the rights of nature and nations, and to solemn treaties, has long been carrying on a cruel, oppressive, and flagitious war against us, shows such a total want of all duty and allegiance to our country, and such an abandoned spirit of seditious and treasonable subjection to the will of a foreign and hostile government, as ought to excite the detestation of all good men, and lovers of their country.

On the ſame night, and at the hour of two of the clock in the morning, and from that to day light, ſome of the ſame party paraded through the ſtreets of this town, beating a drum, and playing a fife, to the diſturbance and alarm of the inhabitants. This is an offence, it is a public nuiſance, as tending to excite alarm, and to deprive peaceable citizens of that ſeaſonable repoſe, and quiet ſleep, of which the laws engage to protect them in the enjoyment. To prevent great evils, you muſt prevent the leaſt beginnings: for people naturally begin with little, and proceed from bad to worſe. *June Seſſ.* 1798.

Nothing is more certain, than that the greateſt enemy to liberty is licentiouſneſs, and that the ſureſt way to deſtroy our privileges is to abuſe them. Liberty of the preſs has always been conſidered as an important right; but, if it be abuſed, if it degenerate into licentiouſneſs, the abuſe muſt be corrected, if we would preſerve the true liberty of the preſs. Printing is an uſeful art, and newſpapers are important means of information. But if printers publiſh falſehood, indecency, or profaneneſs, they poiſon ſociety, corrupt morals, and undermine religion. Nothing is more dangerous and deteſtable, than ſuch printers and newſpapers. They are public nuiſances. Such newſpapers ought to be rejected, and ſuch printers puniſhed.

In all calamity, the pious man looks up to God.—And in all national calamity, pious rulers have conſtantly directed the minds of their people to God, and, for this end, have proclaimed days of faſting and humiliation. In the preſent alarming criſis, the preſident of the United States recommended a day of faſting and humiliation. In a newſpaper publiſhed in this town, there was printed "*A prayer for John Adams on the faſt day.*" This paper, called a prayer, repreſented the preſident of the United States as offering to the Almighty confeſſions and petitions of a ridiculous nature. When a man noted for piety and virtue is thus repreſented in a ridiculous light, as mocking God, the repreſentation is an offence, a libel. When the man thus repreſented is a magiſtrate, and, much more, the chief magiſtrate, it becomes a ſeditious libel, dangerous to the juſt influence of public authority. When the object of this is to turn into ridicule a ſolemn act of religious duty; it becomes an

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Having diſcharged my duty, in the mention of theſe things, I leave them to your ſerious and conſcientious conſideration.

No. XXV.

Liberty of Speech and of the Preſs.

September Seſſions. 1798. IT is of the utmoſt importance to a free people, that the juſt limits of their rights be well aſcertained and preſerved: for liberty without limit is licentiouſneſs; and licentiouſneſs is the worſt kind of tyranny, a tyranny of all. To preſerve ourſelves againſt this, and maintain true liberty, a line muſt be drawn between the rights of each, ſo well marked, as that it be known by all, and ſo well guarded, as that it cannot be paſſed by any with impunity. Thus every man will be free; for every man may exerciſe his rights to the extent of their juſt limits, and no man can go beyond thoſe limits, and encroach on the rights of others. My right to enjoy implies, that no man ſhall diſturb my enjoyment. And it is no reſtraint on my liberty, that in the exerciſe of my rights, I am reſtrained from infringing the rights of others. The rule is, *So uſe your own rights, as not to injure thoſe of others.* Invaſion of the rights of others is tyranny; and if this invaſion may be made by every one, it is tyranny of the worſt kind, for, in proportion to the number of oppreſſors, will be the deſire and opportunity of oppreſſion. The true friend of liberty, therefore, is he, who will ſet ſuch ſtrong limits round the

rights of every man, that, in the exercise of them, no man can interrupt the rights of any other. And they are not friends of liberty, but promoters of licentiousness, tyranny and oppression, who contend, that every man ought to have an unlimited exercise of his own rights, without any regard to the rights of others. I can have no right to injure the rights of another; and if I claim this, I am a tyrant and oppressor. *Sept Sess.* 1798

Reputation, character, good name or opinion, is a kind of property or possession, which every man who has honestly acquired it, has a right to enjoy.* Like any other possession or property, it cannot be taken away from us, but by our own acts. The man who invades the reputation invades the rights of another. And not only individuals, but more especially men in public station, branches or departments of the government, the whole administration, and the principles, constitution or system of government, and the principles or system of public religion and morals, have a right, for the sake of the benefits we receive from them, to reputation, good name or opinion, and the invasion of the reputation of either of those is an invasion of right, a lessening of our comfort, and motives to duty.

But man is endued with faculties of communicating sentiments, of investigating principles, and of forming opinions and judgments. The exercise of those faculties is a source of pleasure and instruction. A knowledge, and a just judgment of principles, of facts, and of characters may be useful for the improvement of our minds, and the regulation of our conduct. The exercise of those faculties, of opinion, reasoning, judgment, and communication, is part of our natural rights.† But the principles of liberty require, that this right, like all our other rights, be limited, so that it never infringe the right of reputation. It must not represent a solemn truth or exercise of religion, as false or ridiculous, an established and useful principle or form of our government, as odious and detestable; a regular and salutary act or motive of the administration, as unlawful, pernicious, or dishonest; or an upright man, as corrupt. For this would be exercising our right of opinion or com-

* *Penn. Const. Art. 9, sect. 11* † *P. C. Art. 9. sect. 7.*

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munication ſo as to infringe the right of reputation, and be violating the principles of liberty and natural right.

The principles of liberty, therefore, the rights of man, require, that our right of communicating information, as to facts and opinions, be ſo reſtrained, as not to infringe the right of reputation. Unleſs it be ſo reſtrained, there is no liberty; for there is no juſt enjoyment of our rights. And, if every man's right of communication be unreſtrained, every man's right of reputation is unguarded; and there is, in this reſpect, univerſal licentiouſneſs, and each man is at the mercy of every man, the moſt precarious and oppreſſive of all ſtates.—Therefore the freeſt governments, which have the moſt regarded and cultivated the principles of liberty, as they have ſo deſcribed and limited other rights, that none ſhould infringe any other, have been careful ſo to define and limit the rights of reputation and of communication of ſentiments, that the right of either ſhould not infringe that of the other.

We communicate our ſentiments by words, ſpoken, written, or printed, or by pictures or other ſigns. The reſtraints laid on the exerciſe of this right, ſo as it may not infringe the right of reputation, differ, according to the way in which the right of communication is exerciſed. If the right of reputation of a private citizen be infringed by words ſpoken, no indictment will lie for this injury, which is only a ground for a civil action, to recover damages. "*In foro conſcientiæ*," ſays a learned author, at the tribunal of conſcience, "it is no excuſe, that the ſlanderous words are true; for, if a man have been guilty of any thing, which the law prohibits, he is liable to anſwer for it, in a legal way; but it can anſwer no good purpoſe for a private perſon to accuſe him thereof; there is a degree of cruelty in ſo doing, and it muſt create ill blood. Yet the law does, in compaſſion to man's infirmities, allow it to be a juſtification, in an action for words ſpoken, that they are true."* But when ſlanderous words are ſpoken of the conſtitution, or adminiſtration, or any of its acts or officers, they are ground for an indictment, as a miſdemeanor, or breach of the duty of a citizen.† The reaſon of this is evident:

* 4 *Bac. Abr.* 480. † *Ib.*

for, as for an injury affecting an individual, the remedy is by action, ſo for an injury affecting the public, the remedy is by indictment. *Sept. Seſſ.* 1798.

With reſpect to libels, or ſlander expreſſed by words written or printed, or by pictures or other ſigns, and infringing the right of reputation; "they have," ſays the ſame author, "at all times, and with good reaſon, been puniſhed in a more exemplary manner than ſlanderous words: for having a greater tendency to provoke men to breaches of the peace, quarrels and murders, they are of much more dangerous conſequence to ſociety.—Words, which are frequently the effect of a ſudden guſt of paſſion, may ſoon be buried in oblivion. But libels, beſides that the author is actuated by more deliberate malice, are, for the moſt part, ſo laſting, as to be ſcarce ever forgiven."* For this reaſon, a libel, affecting the reputation of even a private citizen, is reſtrained, by being conſidered as a public offence, and ſubject to an indictment. But whether, on the trial of ſuch indictment, the truth of the libel may be given in evidence, will depend on the nature of the libel.

Juſtice Blackſtone defines libels, "taken in their largeſt ſenſe, to be writings, pictures or the like, of an immoral or illegal tendency, and, in a more particular ſenſe, any malicious defamations of any perſon, and eſpecially a magiſtrate, made public by either printing, writing, ſigns or pictures, in order to provoke him to wrath, or expoſe him to public hatred, contempt, or ridicule. It is immaterial, with reſpect to the eſſence of a libel, whether the matter of it be true or falſe; ſince the provocation, and not the falſity, is the thing to be puniſhed criminally. Therefore, in a criminal proſecution, the tendency which all libels have to create animoſities, and to diſturb the public peace, is the whole that the law conſiders."†

The conſtitution of our ſtate provides, "that the printing preſſes ſhall be free to every perſon, who undertakes to examine the proceedings of the legiſlature, or any branch of government; and no law ſhall ever be made to reſtrain the right thereof. The free commu-

* 4 *Bac. Abr.* 480. † 4 *Comm.* 150—1.

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nication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely ſpeak, write, and print, on any ſubject, being reſponſible for the abuſe of that liberty. In proſecutions for the publication of papers inveſtigating the official conduct of officers, or men in a public capacity, or where the matter publiſhed is proper for public information, the truth thereof may be given in evidence. And, in all indictments for libels, the jury ſhall have a right to determine the law and the facts, under the direction of the court, as in other caſes."*

From this ſtatement of the law reſpecting libels, the following deductions ſeem evident :—

1. This right, of free communication of thoughts and opinions, is, like all other rights, limited by reſponſibility for its abuſe ; and laws to puniſh its abuſe, are not, in a conſtitutional or juſt ſenſe, reſtraints on the liberty of the preſs.

2. The general rule is, that, in indictments for libels, truth cannot be given in evidence.

3. This general rule is excluded only from the caſes mentioned in this ſection of the conſtitution, and remains applicable to all other caſes.

4. It is only in ſo far as the paper charged as a libel inveſtigates the official conduct of officers, or men in a public capacity, or where the matter publiſhed is proper for public information, that the truth thereof can be given in evidence. In all other caſes, truth is no juſtification ; for it is the provocation which conſtitutes the offence.

5. As grand juries hear evidence only in behalf of the proſecution, and, in indictments for libels, as in other caſes, the jury determine the law and the facts, under the direction of the court, (that is, conforming to this direction in point of law, have a right to give a general verdict) the grand jury, generally ſpeaking, cannot aſcertain whether the libellous matter be true or not ; but, if the making or publiſhing of the libel be proved, they will find the bill ; and, on the trial before the traverſe jury, the court will direct, whether evidence of the truth be admiſſible or not, and whether the matter

* *Conſt. Art. 9, ſect. 7.*

be libellous or not; and, under the direction of the court, the traverſe jury will determine the law and the facts. If a traverſe jury ſhould determine, that a paper is a libel, which is not, and convict a man, who has committed no offence, the court has a controul over their verdict, by granting a new trial, or arreſting judgment. But if the jury determine that a libel is no libel and acquit a man really guilty of an offence, the court has no controul over this verdict: for a man acquitted of a criminal charge, can never be tried again on the ſame charge. *Sept. Seſſ.* 1798.

Such ſeems to be the ſtate of the right of communication of thoughts and opinions, according to the law of Pennſylvania. Any thing may be ſpoken, in terms of decency proper to the ſubject, of the government, an officer, or an individual, provided the ſpeaker can prove it to be true. But all truths are not uſeful or proper for publication, therefore all truths are not to be written, printed, and ſo uttered or publiſhed. And therefore, except in the caſe of papers inveſtigating the official conduct of officers, or men in a public capacity, or where the matter publiſhed is proper for public information, if any man write, print, utter, or publiſh, a libel, he may be indicted, convicted, and puniſhed, whether the libellous matter be true or not.

Congreſs, in its laſt ſeſſion, has paſſed a law,* enacting, that, if any perſons ſhall unlawfully combine together, with intent to oppoſe any meaſure of the government of the United States, or impede the operation of any law of the United States, or to prevent any perſon holding any office under the government of the United States from performing his duty; or ſhall, with ſuch intent, adviſe, or attempt to procure, any inſurrection, riot, unlawful aſſembly or combination; they ſhall be deemed guilty of a high miſdemeanor, and be puniſhed by a fine, not exceeding five thouſand dollars, and by impriſonment, for not leſs than ſix months, nor more than five years; and may, further, be holden to ſureties for good behaviour. And it further enacts, that if any perſon ſhall write, print, utter, or publiſh, or ſhall cauſe

* 14*th July*, 1798.

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or procure to be written, printed, uttered, or publiſhed, or ſhall knowingly and willingly aid in writing, printing, uttering or publiſhing, any falſe, ſcandalous, and malicious writing, againſt the government of the United States, or either houſe of congreſs, or the preſident of the United States, with intent to defame the ſaid government, or either houſe of congreſs, or the preſident; or to bring them, or either of them, into contempt or diſrepute; or to excite againſt them, or either of them, the hatred of the people of the United States; or to excite unlawful combinations therein, for oppoſing or reſiſting any law of the United States, or any act of the preſident of the United States, done in purſuance of any ſuch law, or of the powers veſted in him by the conſtitution of the United States; or to oppoſe or defeat any ſuch law or act; or to aid, encourage, or abet, any hoſtile deſigns of any foreign nation againſt the United States, their people or government; ſuch perſon ſhall be puniſhed by a fine, not exceeding two thouſand dollars, and impriſonment, not exceeding two years.

This act, which ſeems to be beſt known by the name of *the ſedition act*, provides, "that, if any perſon ſhall be proſecuted under it, for writing or publiſhing any libel, it ſhall be lawful for him, on the trial of the cauſe, to give in evidence, in his defence, the truth of the matter contained in the publication charged as a libel. And the jury who ſhall try the cauſe ſhall have a right to determine the law and the fact, under the direction of the court, as in other caſes." This clauſe, clearly borrowed from the ſection already quoted of the conſtitution of Pennſylvania, confirms, ſo far as concurrent expreſſions of different perſons on the ſame ſubject can, the conſtruction which I put on that ſection, that the time for giving in evidence the truth of the libellous matter is at the trial of the cauſe by the traverſe jury.

No law ſeems to have been reſiſted in congreſs with more vehemence and paſſion, by thoſe who oppoſed all the meaſures adopted, as meaſures of defence againſt the hoſtile ſpirit of France. And, out of doors, it has been attacked with ſullen rancour, as a death wound to the progreſs of that deteſtable ſyſtem of ſlander, which has been purſued with ſuch malignant induſtry, and calamitous ſucceſs, againſt every meaſure of the adminiſtration.

And yet, ſtrange as it may ſeem, this law does not create any new offence; for every thing forbidden by it appears to me to have been, before, an offence at common law. The combinations and attempts therein forbidden are miſdemeanors. Any writing of an immoral or illegal tendency is a libel.* And ſlanderous words ſpoken of the government, or its acts or authority, are punishable by indictment.† *Sept. Sess.* 1798

It may be aſked, then, why was this law made? Several reaſons may be given for it.

1. It is no uncommon thing for a legiſlature to make an act declaratory of the common law. At this time, it was peculiarly proper to make ſuch an act, as a ſolemn admonition to wicked or unthinking men, to abſtain from practices, which ſpread ſlanders and falſehoods, foment diviſions and ſeditions among the citizens, weaken the energy of the government, and thus rendering the nation defenceleſs, encourage France, by a proſpect of impunity and ſucceſs, to meaſures of aggreſſion and hoſtility.

2. A doubt had been ſuggeſted whether the courts of the United States had cognizance of any offences not expreſſly declared by the conſtitution, or ſome law or treaty of the United States. I do not think this doubt well founded. It has been ſupported by an aſſertion, that the judiciary of the United States has no *common law* juriſdiction: and this aſſertion has been triumphantly diſplayed in a variety of ſhapes, and propped up by a variety of illuſtrations. Yet, in my opinion, it is deluſive, and founded on a miſconception of ideas, and miſconſtruction and abuſe of words. There is a *common law* juriſdiction incident to every man, to every ſtate of ſociety, and to every organization of civil government; a power neceſſary for ſelf-preſervation. A juriſdiction, to correct offences againſt individuals or ſociety within it, or againſt its own ſafety, is, by *common law*, incident to the judiciary of each ſtate. And a juriſdiction, to correct offences againſt the ſafety of the United States, is, by *common law*, incident to the judiciary of the United States. The judicial power of the United States extends to all caſes ariſing under the conſtitution, the laws and

* 4 *Comm.* 150. † 4 *Bac. Abr.* 480.

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treaties of the United States.* Hence reſults a juriſdiction to try and puniſh, as miſdemeanors, all acts tending to violate or weaken the authority of the conſtitution, or of any act or meaſure of the government of the United States. For it cannot be ſuppoſed, that ſuch miſdemeanors ſhould paſs unpuniſhed, or that the government of the United States ſhould be obliged to beg protection from the individual ſtates. The doubt however exiſting, it might be thought proper to remove it.

3. It might be thought proper to paſs this law, in order to limit the extent of puniſhment which might be inflicted on the offender; and to give him the advantage of proving the truth of the libel in his defence.

Whatever might have been the motive for making this law, it was oppoſed on two grounds: 1, As unconſtitutional; and, 2, as inexpedient.

1. It was ſaid to be unconſtitutional, becauſe the conſtitution declares, that "the powers not delegated to the United States by the conſtitution, nor prohibited by it to the ſtates, are reſerved to the ſtates reſpectively, or to the people;"† and more expreſſly, that "congreſs ſhall make no law abridging the freedom of ſpeech or of the preſs."‡

The conſtitution, like every other inſtrument, muſt be conſtrued, by taking the whole together. Among the powers which the conſtitution delegates to congreſs, is a power "to make all laws, which ſhall be neceſſary and proper for carrying into execution all powers veſted by this conſtitution in the government of the United States, or any department or office thereof."§ It is evident, that the attempts and writings, declared puniſhable by this law, have a direct tendency, differing only in degree from force, to prevent or obſtruct the execution of the powers veſted by the conſtitution in the government of the United States. Therefore a law, declaring that ſuch attempts and writings are puniſhable, is conſtitutional, as neceſſary and proper for the execution of the powers of government.

If the clauſe of the conſtitution which prohibits congreſs from making any law abridging the freedom of

* *Conſt. art.* 3, *ſect.* 2. † *U. S. Conſt. add. art.* 12.
‡ *Ib. art.* 3. § *U. S. Conſt. art* 1, *ſect.* 8

speech or of the press, is to be construed as prohibiting congress from making any law declaring libels against the government, acts, or measures of the United States, to be punishable; then, by the same construction of the constitution of Pennsylvania, which declares, that no law shall ever be made to restrain this right, the most false and malicious libels might be published, against the government, acts, or measures of this state, (and of course of the United States) and the assembly would have no power to make any law, declaring such libels punishable; and thus absolute impunity for them would be established. This is a construction too absurd to be received as true. Nor will it justify such construction of the constitution of the United States, to say, that it was intended by that constitution, that the authority of passing laws against libels should be left to the individual states: for this would be supposing that the government of the United States must, unless the individual states choose to afford it, be without defence against the most dangerous enemy that can attack it, slander; against which, if unrestrained, no government can support itself. This, therefore, would only remove one absurdity by another, and some other construction of this clause of the constitution must be sought for. *Sept. Sess.* 1798.

When the press was abused by being made a vehicle of slander, governments laid restraints on it. Books were to be printed only in certain places, only of a certain nature, and only by licence of certain persons. In England, these restrictions were imposed first by the authority of the king, part of whose prerogative the regulation of printing was considered; then by the star chamber, an organ of executive authority; and in the time of the commonwealth, and after the restoration, and after the revolution, by the parliament. The law restraining the liberty of the press, expiring in 1794, was not renewed, and the press became free.* For freedom of the press consists in this, that any man may, without the consent of any other, print any book or writing whatever, being, in this, as in all other freedom of action, liable to punishment, if he injure an individual or the public.

* *Hume's Eng. app. James I, vol.* 4, *p.* 318. 4*Comm.* 151-2.

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For thus underſtanding the liberty of the preſs, I ſhall quote the reſpectable authority of Sir William Blackſtone. "Where blaſphemous, immoral, treaſonable, ſchiſmatical, ſeditious, or ſcandalous libels are puniſhed, the *liberty of the preſs*, properly underſtood, is by no means infringed or violated. The liberty of the preſs is indeed eſſential to the nature of a free ſtate:—but this conſiſts in laying no *previous* reſtraints upon publications, and not in freedom from cenſure for criminal matter when publiſhed. Every free man has an undoubted right to lay what ſentiments he pleaſes before the public: to forbid this is to deſtroy the freedom of the preſs: but if he publiſhes what is improper, miſchievous, or illegal, he muſt take the conſequence of his own temerity. To ſubject the preſs to the reſtrictive power of a licenſer, as was formerly done, is to ſubject all freedom of ſentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to puniſh any dangerous or offenſive writing, which, when publiſhed, ſhall, on a fair and impartial trial, be adjudged of a pernicious tendency, is neceſſary for the preſervation of peace and good order, of government and religion, the only ſolid foundation of civil liberty. Thus the will of individuals is ſtill left free; the abuſe only of that free will is the ſubject of legal puniſhment. Neither is any reſtraint hereby laid upon freedom of thought or enquiry: liberty of private ſentiment is ſtill left; the diſſeminating or making public of bad ſentiments, deſtructive of the ends of ſociety, is the crime which ſociety corrects. A man may be allowed to keep poiſons in his cloſet, but not publickly to vend them as cordials. And the only plauſible argument heretofore uſed, for the reſtraining of the freedom of the preſs, *that it was neceſſary to prevent the daily abuſe of it*, will entirely looſe its force, when it is ſhewn (by a ſeaſonable exertion of the laws) that the preſs cannot be abuſed to any bad purpoſe, without incurring a ſuitable puniſhment. So true will it be found, that to cenſure the licentiouſneſs, is to maintain the liberty of the preſs."*

* 4 *Comm.* 151—3.

Such is the liberty of the prefs, which the people of the States of America, for its greater fecurity, have made part of their fundamental law. In their ſtate conſtitutions, they provided, that their legiſlatures ſhould not make any law reſtraining the liberty of the preſs, that is, ſhould lay no *previous* reſtraints on the preſs; or, as the Pennſylvania conſtitution expreſſes it, that "every citizen may freely ſpeak, write, and print, on any ſubject, *being reſponſible for the abuſe of that liberty.*"*— The ſame principle was afterwards adopted into the federal conſtitution; and the ſection eſtabliſhing it there is to be conſtrued in the ſame manner. So that the liberty of the preſs is preciſely as ſtated by Sir William Blackſtone, its being free from all previous reſtraint, but, as all other rights or liberties are, ſubject to correction for its abuſe. On this liberty of the preſs in England, parliament may, at any time, impoſe previous reſtraints; but here a conſtitutional proviſion puts it out of the power of any legiſlature to do ſo. *Sept. Seſſ.* 1798.

This law then is no abridgment of the freedom of ſpeech or of the preſs, and is therefore no infringement of the conſtitution. So far is it from this, that, as it makes no new offence, it is no alteration of the criminal code, only as it enlarges the bounds of defence, limits the puniſhment, and (if this be an alteration) gives expreſs juriſdiction to the federal courts. It is not injurious either to the conſtitution, or to the liberty of the preſs, but is intended and adapted for the ſupport of both; for, it cannot be too often repeated, "to cenſure the licentiouſneſs is to maintain the liberty of the preſs."

To reſtrain the abuſe of my right, or ſuch an exerciſe of it as ſhall encroach on a right of another, is no reſtraint or abridgment of my right: for I can have no right to leſſen the right of another. And to claim ſuch an unlimited uſe of my right, as to encroach on the right of another, is to claim, not liberty, but tyranny; not right, but oppreſſion. "I may freely ſpeak, write, and print, on any ſubject;" but "I am reſponſible for the abuſe of this liberty." Unleſs I may ſpeak, write, and print, my right will not be ſufficiently ſecured; and unleſs I be reſponſible for the abuſe of this liberty, the rights of

* *Art.* 9, *ſect.* 7.

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others would not be ſufficiently ſecured. Therefore, to ſecure all, and eſtabliſh true liberty, I muſt be free to ſpeak, write, and print, but be alſo reſponſible for the abuſe of that liberty. This is a ſound principle, and applies to all rights whatever. It applies to our right of action, as well as to our expreſſing our ſentiments in every way. I may ride a horſe, but I muſt not ride over a man. I may walk where I pleaſe, but not on my neighbour's garden. I may uſe my cane, but not to ſtrike any man I meet. Such is the liberty of ſpeech or of the preſs. A law that any printing preſs ſhould be locked up, and the key kept by a certain officer, or that no book ſhould be printed without permiſſion from a certain officer, would be a law abridging the liberty of the preſs. A law, that a man ſhould not ſpeak without permiſſion, ſhould ſpeak only on certain ſubjects, or ſhould have a gag put in his mouth, not to be taken out but by certain officer, would be an abridgment of the freedom of ſpeech, would be indeed a *gagging law.** But becauſe the conſtitution denies the legiſlature any power to make a law like this, or to make any law laying a *previous* reſtraint on ſpeech or the preſs, to claim therefore a right, from the conſtitution, to ſpeak, write, or print, ſedition, impiety, blaſphemy, or any falſehood, however groſs, indecent, and dangerous, is claiming, not liberty, but licentiouſneſs. Will any one ſay, that my right of freedom of ſpeech intitles me to propagate with impunity any ſlander I pleaſe, upon all my neighbours? What character would be ſafe, and what life would be free from miſery, were this liberty of ſpeech to be indulged? There is no ſuch liberty. A liberty to deſtroy reputation would be as unjuſt as a liberty to deſtroy life. Every man is free to ſpeak, but he ſpeaks at his peril, and is anſwerable for all he ſays, if it tend to the injury of another. It is not his opinion of its being proper or true, that will juſtify him. When he utters it, he is anſwerable for its truth and propriety; and the opinion of a court and jury, not his opinion, muſt decide on its truth and propriety. Every repeater of the tale is, in like manner, anſwerable as the author. So of libels, or written or printed ſlander, with this dif-

* *This expreſſion has been applied to the ſedition law.*

ference, that, as the provocation by them is more dangerous, they are leſs indulged; and, except in the caſe of matters proper for public information, the proceedings of government, and the official conduct of officers, or men in a public capacity, truth is no juſtification. Even in caſes where truth is a juſtification, the truth muſt be made out to the ſatisfaction of a jury. That the libeller may have thought it true, though it may extenuate, will not juſtify, the offence: for no man is to be judge in his own cauſe, and my opinion will not juſtify me in doing an injury to my neighbour, in his reputation, any more than in his perſon or property. Every man, therefore, writes and prints, as he ſpeaks, at his peril; and the publiſher of a libel is anſwerable, in like manner as the author. And both are anſwerable, as in any other offence, to the judgment of a court and jury, by whoſe opinion, and not of the offender, muſt the guilt or innocence of the action be determined. And ſuch reſtriction, if I may ſo call it, or correction of the abuſe, of freedom of ſpeech and of the preſs, is not only perfectly conſiſtent with the principles of civil liberty in general, and with the rules of our conſtitution; but is neceſſary for our maintaining the genuine liberty of ſpeech and the preſs. For, of all enemies to liberty, licentiouſneſs is the greateſt. *Sept. Seſſ.* 1798.

2. I think, the expediency of this law can be as clearly ſhown, as its conſtitutionality: and, if ſo, there will be not only duty, but pleaſure in the obedience we yield to it.

Speech, writing, and printing, are the great directors of public opinion, and public opinion is the great director of human action. Of ſuch force is public opinion, that, with it on its ſide, the worſt government will ſupport itſelf; and, with it againſt it, the beſt government will fall. All governments are ſupported by it; and, without it, can no government be ſupported. What is the force in the power of any government, compared to that of the people governed by it, if the people chooſe to reſiſt? And will they not chooſe to reſiſt, if their opinions be ſet againſt the government, their paſſions rouſed to enthuſiaſm, and an opportunity offered for ſucceſs? And all this may be done by means of clubs, ſocieties, and the preſs. Give to any ſet of men the

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It will not be pretended, that the old government of France was good, nor denied, that it needed reformation; but, in ſo far as it poſſeſſed ſtrength, and as it was ſupported by the prejudices of the people in its favour, it is a proper inſtance of what I have ſtated. The French revolution was accompliſhed by a gradual operation on public opinion. For many years before, the ſeeds of inſurrection had been buſily ſown in the minds of the people. Clubs and ſocieties, under various names and pretexts, were eſtabliſhed through the kingdom.—The printing preſſes were occupied. Pamphlets and books were diſperſed. New principles were broached, ſupported, and eſtabliſhed. Under the ſanction of philoſophy and reaſon, all prejudices in favour of religion and government were gradually ſapped, to make way for *liberty*, *equality* and *the rights of man*; fine words, which, as they were little underſtood, were the more admired. All were men; and prieſts and princes were no more. All reſpect for office ceaſed: and an inſult to a biſhop or a king was no more than an inſult to an equal. Religion was but a ſtate trick, and its author and miniſters but impoſtors. Public opinion, the great pillar of this, as of any other government, being thus withdrawn, the mighty fabric of the monarchy, which, ſupported by public opinion, had ſtood the blaſts of ages, was touched by a ſlight ſhock, and, in a moment, crumbled to pieces.

What was the conſequence? Not ſatisfied with reformation, public opinion, directed by clubs, was employed to lead the nation to exceſs, anarchy, and ſlavery. The deſperate ſucceſſion of tyrants, which hath ſince ruled France was ſupported by public opinion, directed by clubs and the preſs, till it acquired an enormous armed force. When diſguſted by its cruel and unprincipled oppreſſion, public opinion began to revolt, and the printing preſſes to ſpeak againſt it; even this tyranny, with its vaſt armed force, felt that it could not

resist public opinion, and, to silence it, shut up the presses; and now extorts, from an unhappy nation, a sullen and reluctant submission, by its armed force, and an enslaved press. *Sept. Sess.* 1798.

The same seeds of dissolution were sown in most of the governments of Europe, by the corruption of public opinion, effected by a combination of clubs and the press. Many have fallen sacrifices. And nothing but the dreadful example, which the French revolution furnished, of the fatal danger of substituting abstract principles instead of the maxims of experience, could have preserved many other governments.

One would have thought, that the United States of America, blest with the best practicable mode of republican liberty, which human wisdom hath yet been able to suggest, would have escaped this greatest of all plagues, the corruption of public opinion; and that all men would have united in approbation of a system of government, which must be acknowledged excellent, and of an administration, which must be acknowledged to have been wise, enlightened, and honest. Yet, unfortunately, this plague hath reached us also; and our government has been assailed with the grossest slanders, by many who perhaps believed, and by many who surely could not believe, the slanders which they uttered. The tongue, the pen, and the press; conversations, letters, essays, and pamphlets, have represented our truly republican and balanced constitution, as a system of tyranny; and our upright and wise administration; as mischievous and corrupt. Our wisest and best public officers have had their lives embittered, and have been driven from their stations, by unceasing and malignant slander. And thus has it been attempted to withdraw, from our excellent government, the only effectual support of any government, public opinion; and thus to withdraw all reverence from station and authority, deprive the constitution, the laws, and the administration, of all respect and efficacy, and surrender the nation a prey to any invader.

France saw our condition, and attacked us: For France attacks a nation only when she has rendered it defenceless, by dividing the people from the government, and withdrawing from the government the support of

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public opinion. In this condition, any nation is an eaſy prey. To our complaints ſhe pretended no juſtification, and replied to our reſentment, that ſhe had a party among ourſelves. She reſted on the influence of clubs and the preſs, and on the devotion to her, which they had produced among us. Some of our preſſes ſeem to have been conſtantly devoted to her views. Many of our citizens, and of our men in public ſtations ſeem to have favoured thoſe meaſures, on which France muſt have depended for ſucceſs againſt us. And our government was threatened with the loſs of its beſt ſupport, the hearts of its citizens, by means of falſehood, miſrepreſentation, and the vile arts of foreign enemies, and diſcontented, factious, and ſeditious men. In this ſituation, in which no government can long ſtand, and threatened with avowed war from France, was it not the duty of our government, to diſarm France of that weapon, by which ſhe could moſt effectually injure us, the power of ſpreading ſlander and ſedition againſt the government, and alienating from it, its true ſupport, the affections of its citizens? It was its duty, and it would have been inexcuſeable, if it had omitted this duty. Without ſuppreſſing ſlander and ſedition againſt the government, the ſupport of public opinion cannot be preſerved to it; and without the ſupport to it of public opinion, all other defence againſt France is vain.

On theſe grounds, it appears evident to me, that this law is not only expedient, but neceſſary. And it may be laid down as a general rule, that it will be impoſſible to prevent the general corruption of public opinion, or to preſerve any government againſt it; unleſs there be laws to correct the licentiouſneſs of ſpeech and of the preſs. True liberty of ſpeech and of the preſs conſiſts in being free to ſpeak, write, and print, but being, as in the exerciſe of all our our other liberties, reſponſible for the abuſe of this liberty. And whether we have abuſed this liberty or not, muſt, like all other queſtions of right, be left to the deciſion of a court and a jury. This is the univerſal teſt, by which the exerciſe of all our rights muſt be tried. Nor is the ſubjection of our right of freedom of ſpeech and of the preſs to this teſt, any more a reſtraint on that right; than the ſubjection of our rights of life and of property to the ſame teſt, is

a reſtraint on thoſe rights. By this teſt muſt the exer- *Sept. Seſſ.* 1798.
ciſe of all our rights be tried, or no man could enjoy any right whatever. If, while our right to life and to property is ſubmitted to this reſtriction, we yet believe we are free, ſhall we think our liberty infringed, by ſubjecting, to the ſame reſtriction, our right to ſpeak and print?

This law takes from no man any liberty, but a liberty of doing miſchief. And, ſo far is it from being true, that this law is any violation of liberty, that, it may be ſafely averred, without ſuch laws, for puniſhing the abuſe of the freedom of ſpeech and of the preſs, liberty cannot be preſerved: every man will be a ſlave to the malignant paſſions of every other; truth and juſtice will be baniſhed, the authority of government deſtroyed, and malice, anarchy, confuſion, and every evil work eſtabliſhed.

Our conſtitution is excellent, our adminiſtration is wiſe and honeſt, and has no intereſt ſeparate from that of the people. On the ſupport of ſuch an adminiſtration of ſuch a government depends our liberty. But, let me repeat, no adminiſtration or government can ſtand againſt the corruption of public opinion; and let me, therefore, ſolemnly admoniſh you, as you value the peace and liberty of yourſelves and your poſterity, ſeriouſly to reflect on the truth of this. We have ſeen an inſurrection promoted by the corruption of public opinion.—An invaſion is invited by it. How many ſhocks of this kind our government is doomed to ſtand, only the Ruler of the world knows. Let us take warning from our own experience, and the fate of other nations. Let all friends to liberty and order unite in ſuppreſſing ſlander: for, where it prevails, there will be no happineſs, no government. Of all ſlanders thoſe of the preſs are moſt dangerous. Preſſes eſtabliſhed to run down the government are the moſt deſtructive of all treaſons. This ought to be well conſidered; for every one who encourages ſuch preſſes, or contributes to their ſupport, is a partner in their guilt. Every one, who reads their productions with approbation, ſucks in diſeaſe upon his mind; and every one, who repeats them to others, ſpreads the infection. What would we think of a ſet of men, who ſhould agree to hire a number of perſons to

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run through the country, and report falſehoods and ſlanders? Preciſely ſuch, and more dangerous, is the guilt of thoſe, who contribute to the ſupport of a ſlanderous preſs. They are wounding their own and their country's peace, and undermining the government.

But you will ſay, *We deſire to hear both ſides, that we may know the truth.* My friends, truth has but one ſide: and liſtening to error and falſehood is indeed a ſtrange way to diſcover truth. Take the repreſentations which its friends have made of the conduct of government; have ye ever found falſehood in them? Take the contradictory ſtatements made by its enemies; have ye ever found truth in them?

You may yet ſay, *We have not the means of knowing on which ſide the truth lies; and we, therefore, give no preference to any, but hear all.* What would ye think of a Proteſtant who ſhould ſay thus? *The Lutherans and Calvaniſts differ in opinion, the Catholics differ from both, and the Mahometans from them all; I know not on which ſide the truth is; I will therefore, pay a lutheran miniſter, a calvaniſt miniſter, a catholic prieſt, and a turkiſh iman; and then I ſhall be ſure of knowing the truth.*— Would ye think, that this man had any regard to truth or religion? Inſtead of acquiring knowledge, would he not confuſe his mind, and loſe ſight of both truth and duty? As in religion ſo in government, a ſincere enquirer after truth will always find means of diſcovering it. And it is only their enemies, and hypocritical pretenders to ſincerity, who, under pretence of ſearching for truth, wander through the endleſs varieties of error, and affect to think there is no certainty.

There is hardly any part of government, which, as of religion, has not been miſrepreſented by its enemies. Now, though of all its parts, the people generally have not had an opportunity of being fully ſatisfied, yet of ſome, they have had this opportunity. And, wherever they have had ſuch opportunity, they muſt be ſatisfied, that the conduct of government has been right, and the miſrepreſentations of it falſe and malicious. No part of the conduct of our government has been more miſrepreſented, than its conduct with reſpect to France. Yet, when fairly ſtated, in a way that the greateſt ſlanderers dare not contradict, how honeſt, wiſe, and praiſe-worthy

does it ſeem! Ought we not, therefore, to believe, that, if we underſtood all the reſt, as well as this part, the whole would appear as unexceptionable? This would be our duty between man and man; and it is alſo our duty, as between citizens and the government. *Sept. Seſſ.* 1798

Another duty, and a mean of information, is to ſearch at the beſt ſources of information. You ought never to believe a ſlander on government, merely becauſe it is ſtated in a newſpaper, or a pamphlet, or reported by thoſe, in whoſe judgment, veracity, and opportunity of knowing, you have not confidence. As if the thing concerned your own houſe or eſtate, or the character of your friend, go to thoſe, in whoſe veracity and judgment, you would confide in matters of the greateſt importance. For, be aſſured, no matter is of greater importance, than a juſt confidence in government. The men, who endeavour to rob you of this, are the worſt enemies of your peace. If they can ſucceed in robbing your minds of this confidence, they rob you of your liberty; for they deprive government of its authority; and government without authority, is anarchy; and anarchy is the worſt tyranny. No crime, therefore, is greater, than that ſlander, which diminiſhing the people's confidence in the government, diminiſhes their ſecurity, and deſtroys their liberty. And no crime more deſerves the vigilant and ſevere animadverſion of a grand jury.

No. XXVI.

A Defence of the Alien Act.

IN circumſtances of extraordinary danger or alarm, extraordinary meaſures muſt be adopted: for ordinary means are incompetent for extraordinary occaſions. Though I may not kill a man, while I am in no danger from him; yet if he be in the act to kill me, or I find him breaking into my houſe, in the night time, to rob me, I may put him to death. This reſults from the *December Seſſions.* 1798.

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general law of ſelf-defence. The right of property will not forbid us, when a houſe is on fire, to pull down the adjacent buildings, to ſave the reſt of the town. Nor will the right of perſonal liberty reſtrain the magiſtrate, from committing to gaol a man who has not actually done miſchief, if another is juſtly afraid of miſchief being done by him. All theſe are extraordinary caſes, to which the ordinary rules of property, or of perſonal liberty and ſafety are not applicable: and the violation of thoſe rules, in ſuch caſes, is, in true conſtruction no violation of them: for they were never meant to be applied to ſuch caſes, but only to the ordinary and peaceful ſtate of ſociety, and muſt yield to the great law of ſelf-preſervation and common welfare.

Nations, like individuals, are alſo bound, by the law of ſelf-preſervation, in times of danger, to adopt meaſures, which would be altogether unjuſtifiable in ordinary times. They may deſtroy an hoſtile army. If an hoſtile army be ſuffered to march through a neutral country, to attack another nation, this nation may alſo enter that country, and oppoſe its enemy. If fields, gardens, houſes, or towns, ſhelter its enemy from the full force of attack, they may be deſtroyed. If it be neceſſary to weaken the enemy by want, the corn, cattle, and all kinds of proviſions may be carried off, and the frontier made, as it were, a deſart. Such things are, in times of danger, juſtifiable by the law of ſelf-defence; though, in ordinary times, they would be unlawful and inhuman. On the ſame principles of ſelf-defence, to prevent a dangerous communication of intelligence, or any meaſure unfavourable to its ſafety, when a nation is, or is likely to be, engaged in war, it may order any aliens, who may be ſuſpected of promoting or favouring the deſigns of its enemy, to depart out of its territory. This may be always, and has been generally done. And, unleſs where this right is regulated by treaty, this may be done, at the diſcretion of the government under which the aliens reſide. For every government muſt be ſole judge of what is neceſſary to be done, for its own ſafety or advantage, within its own territory.* And, even with reſpect to their own ſubjects, moſt governments

* *Vattel, L. of N. Prel. ſect.* 17, 20, *B.* 2, *ſect.* 94.

have reſerved a right, without being required to ſhew any cauſe, to commit to cloſe cuſtody any ſubject ſuſpected as dangerous to the peace or welfare of the community. In England, this right is reſtrained by the writ of *habeas corpus*, which gives to every ſubject impriſoned an opportunity of requiring the cauſe of his commitment, and of obtaining, in all proper caſes, his enlargement. When, therefore, the king of Britain's miniſters find it neceſſary, for political reaſons, to reſtrain the perſonal liberty of any ſubject, without ſhewing any cauſe for it, a law muſt be obtained from parliament, ſuſpending the privilege of the writ of *habeas corpus*; and parliament, may, whenever it pleaſes, paſs ſuch a law. *Dec. Seſſ.* 1798.

Conforming to the principles of liberty inherited from our anceſtors, the privilege of the writ of *habeas corpus* is eſtabliſhed, as a principle, in the government of this ſtate and of the Union.* And, though congreſs or the general aſſembly may, reſpectively, like the Britiſh parliament, by law, ſuſpend this privilege; yet they cannot, like the Britiſh parliament, paſs ſuch law whenever they pleaſe. For the federal and ſtate conſtitutions have declared, that "The privilege of the writ of *habeas corpus* ſhall not be ſuſpended, unleſs when, in caſes of rebellion or invaſion, the public ſafety may require it." So that, in this country, no citizen can be deprived of his liberty, without an avowed and ſufficient cauſe, unleſs, in caſe of rebellion or invaſion, the legiſlature think the public ſafety requires it, and ſuſpend the privilege of the writ of *habeas corpus*. But here the conſtitution leaves aliens, as in other countries, to the protection of the general principles of the law of nations, or of the particular proviſions of treaties made between the United States, and the government whoſe ſubjects or citizens the aliens ſeverally are.

Congreſs, in its laſt ſeſſion, found the United States in extraordinary circumſtances of peril, unequalled ſince their independence was ſolemnly acknowledged. France, having, without any reſpect to the principles of liberty,

* *U. S. Conſt. Art.* 1, *ſect.* 8. *Penn. Conſt. chrt.* 9, *ſect.* 14. 1 *U. S. L.* 101. 2 *St. L.* 241.

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the law of nations, or the rights of individuals, plundered the land to the utmoſt reach of her graſp; extended the ſame unprincipled rapacity to the ocean, and plundered indiſcriminately friends and foes. Of all nations and governments, none had with more affection regarded the revolution of France, none had more aſſiduouſly cultivated her friendſhip, none had more ſcrupulouſly obſerved the rules of neutrality, or, conſiſtently with thoſe rules, partially indulged the views of France; than the nation and government of the United States. And if neutrality, juſtice, affection, and gratitude, could have exempted any government and nation from injury from France, the nation and government of the United States might juſtly have claimed this exemption. But what weight has juſtice, with a government without principle, without religion, and without an intereſt in the proſperity of the people over which it is placed! If the French government had regarded only the intereſt of France, it would have cultivated the affections of America. But the French government, like the falſe mother indifferent to the life of the child, regarded not the intereſt of the French nation, but the indulgence of its own paſſions, and the triumph of its own pride; which, exalted by ſucceſs beyond the bounds of moderation, ſought to humble all authorities in univerſal proſtration at its feet. She commenced and proſecuted ſpoliations of our trade to an extent that threatened its ruin: and the miſchievous effects are diſplayed in the loſſes of our merchants, the ſcarcity of money, and the languiſhing ſtate of our commerce and agriculture. The American government patiently and peacefully ſought redreſs by negotiation; but the preſumption and rapacity of France roſe, in proportion to the patience and peace of America, and, with unexampled inſolence, ſhe repeatedly drove away our ambaſſadors ſent to claim only an exemption from injury, and a payment of juſt debts; required us, by an ignominious tribute and bribe, to double the damage we had ſuffered: and threatened us, if we refuſed this, with war and ravage on our coaſts, burning of our towns, and even diſſolution as a nation.

What could have ſwelled the inſolence of France to this pitch of extravagance? Had we done her any injury? She can ſhew none. Was it her great ſucceſs and

mighty power? We are at a diſtance to defy her power. How then dared ſhe thus to inſult and injure us? She accounted us a divided people, ſplit into factions among which ſhe had zealous partizans. In this ſtate, ſhe knew, we muſt be an eaſy prey: in this ſtate ſhe knew, we could make no reſiſtance. And, while we remained in this ſtate, ſhe might ſafely perſiſt in her proud oppreſſion: and ſhe did ſo. For men, without regard to religion and juſtice *will* do whatever they *can* do: and nothing but reſiſtance and force will reſtrain them from injuring others. France had long known and promoted diviſions and factions among us. And had ſent ſpies into all parts of our country, to procure information of our circumſtances and opinions. Theſe travelled through America, under various pretexts, of curioſity, of philoſophy, or of avoiding tyranny or perſecution at home. This Talleyrand, who demanded the bribe and loan from our ambaſſadors, travelled through America, as an emigrant; and after his return to France, was appointed miniſter of foreign affairs. From its ſpies and other agents here, the French government received conſtant intelligence of the ſentiments of the citizens, and the meaſures of the government of America; and was thus prepared to promote its own views, and defeat ours. *Dec. Seſſ.* 1798.

If ever there was a time, in which it was proper for any government, to order aliens to depart out of its territory, it was proper for the American government to do ſo at this time. In other countries, this would have been done by a proclamation of the executive.—This was a new caſe under the American conſtitution, and proper for the interference of the legiſlature. Congreſs, therefore, paſſed "*An act concerning Aliens*,"* the ſubſtance of which, in its own words, I ſhall here ſtate.

"*It ſhall be lawful for the preſident of the United States,* "*to order all ſuch aliens, as he ſhall judge dangerous to* "*the peace and ſafety of the United States, or ſhall have* "*reaſonable grounds to ſuſpect, are concerned in any trea-*"*ſonable or ſecret machinations againſt the government*

* 25*th June*, 1798. 5 *U. S. L.* 143.

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" *thereof, to depart out of the territory of the United* " *States, within ſuch time as ſhall be expreſſed in ſuch* " *order. Which order ſhall be ſerved on ſuch alien, by* " *delivering him a copy thereof, or leaving the ſame at his* " *uſual abode, and be returned to the office of the ſe-* " *cretary of ſtate, by the marſhal or other perſon to whom* " *the ſame ſhall be directed.*"

But, " *if any alien ſo ordered to depart ſhall prove, to* " *the ſatisfaction of the preſident, by evidence to be taken* " *before ſuch perſons as the preſident ſhall direct, that no* " *injury or danger to the United States will ariſe, from* " *ſuffering him to reſide therein, the preſident may grant* " *a licenſe to ſuch alien to remain within the United States,* " *for ſuch time as he ſhall judge proper, and at ſuch place* " *as he ſhall deſignate. And the preſident may alſo require* " *of ſuch alien to enter into bond to the United States,* " *in ſuch penal ſum, as he may direct, with one or more* " *ſufficient ſureties, to the ſatisfaction of the perſon autho-* " *riſed by the preſident to take the ſame, conditioned for* " *the good behaviour of ſuch alien during his reſidence in* " *the United States, and for not violating his licenſe;* " *which licenſe the preſident may revoke whenever he ſhall* " *think proper.*

" *And if any alien ſo ordered to depart, ſhall be found* " *at large within the United States, after the time limited* " *in ſuch order for his departure, and not having a licenſe* " *from the preſident to reſide therein; or having obtained* " *ſuch licenſe, ſhall not have conformed thereto; every ſuch* " *alien ſhall, on conviction thereof, be impriſoned for a* " *term not exceeding three years, and ſhall never after be* " *admitted to become a citizen of the United States.*"

This law further enacts, " *That it ſhall be lawful for* " *the preſident of the United States, whenever he may* " *deem it neceſſary for the public ſafety, to order to be re-* " *moved out of the territory thereof any alien who may be* " *in priſon in purſuance of this act; and to cauſe to be* " *arreſted, and ſent out of the United States, ſuch of thoſe* " *aliens as ſhall have been ordered to depart therefrom,* " *and ſhall not have obtained a licenſe as aforeſaid, in all* " *caſes, where, in the opinion of the preſident, the public* " *ſafety requires a ſpeedy removal. And, if any alien ſo* " *removed, or ſent out of the United States by the preſident,* *ſhall voluntarily return thereto, unleſs by permiſſion of the*

" *preſident of the United States*; *ſuch alien, on conviction* Dec. Seſſ.
" *thereof, ſhall be impriſoned as long as, in the opinion of* 1798.
" *the preſident, the public ſafety may require.*"

But it is provided, " *That it ſhall be lawful for any* " *alien, who may be ordered to be removed from the* " *United States, by virtue of this act, to take with him* " *ſuch part of his goods, chattles, or other property, as he* " *may find convenient*; *and all property left in the United* " *States by any alien who may be removed, as aforeſaid,* " *ſhall be ſubject to his diſpoſal.*"

One would have thought, that a law ſo reaſonable in itſelf, ſo conformable to the law of nations, and the practice of all governments, and, while it is altogether conſiſtent with the conſtitution, ſo neceſſary to the ſafety and defence of the United ſtates; if it did not obtain all praiſe, would, at leaſt, have eſcaped all cenſure. Yet this law was not only vehemently oppoſed in congreſs; but even ſince it was paſſed, has been reprobated by ignorant, or wicked and ſeditious men; and, for their vile and ſelfiſh purpoſes, has been held up to deteſtation, as unconſtitutional and tyrannical.—In many parts of the Union, it has been uſed as a pretext and inſtrument, to inflame the paſſions of the people, diſturb the peace of the country, deſtroy reſpect for the laws, and relax the authority of government; and in one ſtate, to produce ſuch a commotion, as threatens an inſurrection, if not a ſeparation from the Union.

It is proper for men in all ſtations, and peculiarly in my ſtation, to endeavour to counteract ſuch miſchievous paſſions, and miſerable conſequences. With this view, I ſhall examine the objections, which I have obſerved to have been offered againſt this law, ſolemnly eſtabliſhed by the authority of the United States.

1. It is objected to this law, that it is contrary to the expreſs words of the conſtitution.

We perhaps ought not to wonder, that this objection is made. Added to the want of ſenſe and knowledge in ſome of the objectors, of modeſty in moſt of them, and the general diſpoſition, from prejudices excited and nouriſhed by ſlander, to believe every act of adminiſtration wrong; the habit of oppoſition prepares their minds to

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make and receive it. For a habit of oppoſing every thing makes dreadful havoc, not only on the feelings and conſcience, but on the underſtanding itſelf.

This objection is made on two grounds.

The firſt is, that the conſtitution declares, that "the migration or importation of ſuch perſons, as any of the ſtates now exiſting ſhall think proper to admit, ſhall not be prohibited by congreſs, prior to the year one thouſand eight hundred and eight; but a tax or duty may be impoſed on ſuch importation, not exceeding ten dollars for each perſon.*" From this it is inferred, that, as congreſs cannot yet prohibit ſuch migration or importation, they cannot remove the perſons who have migrated or been imported; for this, it is ſaid, would be, in effect, prohibiting the migration or importation.

It is well known, that the prohibition in view reſpected only ſlaves. This was univerſally underſtood, at the time of the publication of the conſtitution, during its diſcuſſion, and ever ſince. All the members of the convention know this. The ſpeaker of the houſe of repreſentatives of congreſs, who was a member of the convention, did, in the argument on this bill, in a committee of that houſe, expreſſly declare this to have been the avowed ſenſe of the convention, on this clauſe of the conſtitution; and no man, of any knowlege of the ſubject, has ever ſeriouſly entertained a doubt of this.† The convention was ſo averſe to the traffic in human beings, that they would not directly name ſlaves, ſlavery, or the ſlave trade. The ſouthern members thought

* *Art.* 1 *ſect.* 9.

† *In the debates on the federal conſtitution, in the Virginia convention, Mr. Maſon, a member of that and of the general convention, who refuſed to ſign and refuſed to ratify the conſtitution, ſtated that in the general convention, "the ſubject of commerce and navigation was often under conſideration, and that eight out of twelve, for more than three months, voted for requiring two-thirds of the members preſent in each houſe, to paſs commercial and navigation laws; till a compromiſe took place between the northern and ſouthern ſtates; the northern ſtates agreeing to* the temporary importation of ſlaves, *and the ſouthern ſtates conceding in return that navigation and commercial laws ſhould be on the footing on which they now ſtand."*

their ſtates not yet prepared for the prohibition of this traffic. The other members agreed to give thoſe ſtates twenty years to think of it. In that ſpace, they would probably aboliſh the ſlave trade themſelves; or, after that, congreſs might do it. In the mean time, the convention would not give ſlavery the ſanction of being expreſſly named. Inſtead of the word *ſlaves*, the word *perſons* was uſed; and, to correſpond with this, the word *migration*, and explanatory of this, the word importation, as more properly applicable to ſlaves, or *perſons* conſidered not as aliens, but as *property*. Or, conſidering this prohibition as reſpecting only ſlaves, we find another reaſon for this conſtruction, in the power reſerved to congreſs "to impoſe a tax on ſuch *importation*," while no ſuch power is expreſſed as to migration; and thus for conſtruing thoſe words as meaning a different manner of introducing ſlaves. Congreſs is reſtrained from prohibiting their *importation* by ſea, or their *migration* by land, into any of the ſtates; but may lay a duty on their firſt importation, not on any ſubſequent migration; the duty in that caſe being preſumed to have been paid before. While the prejudices or neceſſities *of the ſtates then exiſting* were thus indulged; the convention confined this indulgence to them, and did not reſtrain congreſs from prohibiting the migration or importation of ſlaves into any ſtate *thereafter to be eſtabliſhed*; but left them to the diſcretion of congreſs. Whatever reaſon may be aſſigned for it, this is certain, that it was the plain meaning of the convention, and has been the uniform conſtruction of the conſtitution, that the reſtraint laid on congreſs, by this clauſe of the conſtitution, applies only to the prohibition of introducing ſlaves. *Dec, Seſſ.* 1798.

But ſuppoſing this not the true conſtruction of this clauſe of the conſtitution, and ſuppoſing that congreſs is thereby reſtrained from prohibiting the migration or importation of any aliens whatever; it does not follow, as a juſt conſequence from this, that congreſs can make no law to remove ſuch aliens. A rule will not be extended beyond the ſtrict words, if this extenſion will promote miſchief; eſpecially if it endanger the ſafety of the people, which is the ſupreme law. I would aſk whether this reſtraint, ſuppoſing it to reſpect aliens generally, muſt not be limited to times of peace; and

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whether it muſt govern in extraordinary times of danger, or muſt then give way to the great rule of ſelf-defence and general welfare? Let us try this conſtruction by the rules of reaſoning. It is a rule, that, if an argument prove too much, it is unſound. Suppoſe a body of Frenchmen, with arms and ammunition, which may be carried for defence, to arrive at Boſton, and tell the people there, that they are *perſons*, who have migrated, to ſettle peaceably in the country. Another body of ſuch emigrants, with the ſame tale in their mouths, arrives at New-York; another at Philadelphia; another at Norfolk; and another at Charleſton. Muſt the ſtate legiſlatures of Maſſachuſetts, of New-York, of Pennſylvania, of Virginia, and of South Carolina, be convened, to order thoſe ſeveral bodies of emigrants to depart out of their ſeveral ſtates? Well, the Boſton emigrants march peaceably into Connecticut; and the South Carolina emigrants into North Carolina; and ſo of the others, till they all meet peaceably in Maryland; and then declare, that they are come, by order of the directory, to ſettle there, and to prevail on the preſident and congreſs to give the tribute demanded by the directory. All this they may do; and yet, if congreſs had proceeded to make a law, to prevent their landing, or effect their removal, we ſhould be told, that congreſs cannot prohibit the migration or importation of aliens! This ſeems a ſtrange abſurdity. And yet the abſurdity of this caſe is only altered, it is not removed, by ſubſtituting the caſe on which congreſs has acted. Spies are, at all times, dangerous; they are generally not leſs, and they are often more dangerous, than open enemies;—and thoſe who corrupt our opinions, and pervert our duties, are the moſt dangerous of all enemies. A power to make ſuch law is clearly neceſſary for the general defence and welfare of the United States; the care of which is properly depoſited with the government of the United States.

For "The people of the United States, in order to form a more perfect union, inſure domeſtic tranquility, provide for the common defence, promote the general welfare, and ſecure the bleſſings of liberty to themſelves and their poſterity*;" eſtabliſhed a conſtitution, by

* *U. S. Conſt. preamble.*

which objects of general concern to the nation are properly submitted to the management of the general government. And this government is expreſsly bound to "guaranty to every ſtate in the Union a republican form of government, and to protect each of them againſt invaſion and domeſtic violence;"* and has "power to make all laws which ſhall be neceſſary and proper for carrying into execution all the powers veſted by the conſtitution in the government of the United States, or any department or office thereof."† The reſtraint or expulſion of aliens, in times of war or danger, has by almoſt all nations, been conſidered as a neceſſary meaſure of protection and ſelf-defence: and, from the nature of the caſe, the laws of nations, and the general conſtitutional authority of the government, I cannot permit myſelf to doubt, that a power to reſtrain or expel them neceſſarily exiſts in the government of the United States, as in every government charged with the general welfare, the common defence, and protection againſt invaſion and domeſtic violence. If this be a neceſſary and proper mean of accompliſhing any object, with which the government of the United States is charged, the power of exerting it is clearly veſted in that government. The difficulty of obtaining the univerſal conſent of the individual ſtates to any meaſure, however ſalutary, was ſufficiently experienced, as the great evil to be remedied by the conſtitution. And a conſtruction of this conſtitution, were it admiſſible, will not be favoured, which would leave the general defence of the nation at hazard on the caprice of a ſingle ſtate. *Dec. Seſſ.* 1798.

But this law is ſaid to be contrary to the expreſs words of the conſtitution, becauſe the conſtitution declares, that "the trial of all crimes ſhall be by jury."‡

There is one general obſervation which applies to all the objections to this law drawn from the conſtitution. It is this; that aliens are not parties to this inſtrument, and therefore can claim no benefit under it, unleſs they are expreſsly named. The conſtitution is made by the people of the United States.§ And for whoſe benefit? For the benefit of the people of the United States, ſurely. It is the charter of the privileges of the citizens of the United

* *Conſt. Art.* 4. *ſect.* 4. † *Art* 1. *ſect.* 8. ‡ *Conſt. Art.* 3. *ſect* 2. § *Conſt. preamble.*

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States, to which none but citizens of the United States can thereby claim title. The people of the United States therein limit the power of their government over themſelves; but lay no reſtraint on the power of their government over aliens. This was not in their view at all. Until aliens become citizens, they are in the power of the ordinary legiſlature. The legiſlature may receive them, and admit them to become citizens; or may reject them, or remove them, before they become citizens. When they come here, they know, that they come at the diſcretion of the ordinary legiſlature, can claim no privileges as citizens, and have no reaſon to complain, if this legiſlature remove them, before they become citizens. The legiſlature may refuſe to admit them to become citizens, by enacting, that citizenſhip ſhall be acquired only by birth. If the legiſlature receive them, retain them, and admit them to become citizens; then, and not before, have they a right to claim the benefit of the conſtitution made for citizens. This is clear reaſoning. The citizens who made the conſtitution, bargained for themſelves, and all who, after them, ſhould become citizens; but did not bargain for aliens. Would an American citizen, removing into France, claim as a citizen, the benefit of the French conſtitution againſt an act of the legiſlature? Would a man received, under the laws of hoſpitality, into the houſe of another, tell the maſter of the houſe, when he orders him to depart, becauſe he ſuſpects him of ill deſigns; "*I will not go, you have a leaſe of this houſe, you have admitted me, I will continue in it under your leaſe?*" Aliens are tenants at will, and may be removed, at the diſcretion of the owner. When they become citizens, they become tenants on fixed terms, and cannot be removed, but according to thoſe terms: they are freeholders, and cannot be deprived of their rights, but on a known forfeiture regularly aſcertained. If, therefore, aliens have no right to remain, it is no deprivation of right to order them to depart; and if it be no deprivation of right, it can be no puniſhment; and if it be no puniſhment, this order may be made without any crime, on the mere ſuſpicion or arbitrary will of the legiſlature, which, with reſpect to them is ſovereign, as, with reſpect to citizens, the conſtitution is ſovereign.

Even a citizen may be deprived of his right to perſonal liberty, without any actual crime, on the mere ſuſpicion of another, on which a magiſtrate deems it neceſſary to require ſecurity of the peace. So may an alien be deprived of our indulgence to remain among us, on the mere ſuſpicion of the legiſlature, that his reſidence here is dangerous to the public peace. This being no deprivation of right, but the mere denial of a favour; is no puniſhment, but a mere exerciſe of the right of ſelf-defence, which the government of the United States, like that of every other nation, may exert at diſcretion, without any crime or any trial. *Dec. Seſſ.* 1798.

All that is ſaid of a right to trial by jury is out of the queſtion. That refers to an inveſtigation of offences previous to puniſhment, or a deprivation of a right.—Here there is no offence, but a ſuſpicion alledged: and, as even in the caſe of a citizen, he may be impriſoned, for the ſecurity of an individual; ſo, in the caſe of an alien, he may be removed, for the ſecurity of the nation. And, in this, there is no puniſhment, becauſe there is no deprivation of a right. It is neither an injury nor a puniſhment; it is a meaſure of ſelf-defence, inherent in every owner of a houſe, to turn out of his houſe a ſtranger, whom he does not chooſe to entertain longer.

I will again put the caſe of a ſtranger, admitted, under the laws of hoſpital ty, into a houſe. The owner thinks he has reaſon to ſuſpect, that this ſtranger intends to rob or murder him; or to aſſiſt a gang of thieves, whom he ſuſpects of this intention. He tells the ſtranger, that he has ſuch ſuſpicion; and deſires him to depart. If the ſtranger ſay, "*your ſuſpicions are wrong, you muſt prove them, carry me before a magiſtrate, and let me be tryed and convicted before you take upon you to turn me out of your houſe*;" would this be an anſwer? Shall the maſter of the houſe, in order to give the ſtranger the privilege of being tried and convicted, give him and his aſſociates an opportunity of accompliſhing the wicked purpoſes ſuſpected? Suppoſe the maſter of the houſe reply, "*I am not well acquainted with your character, but, whatever it be, I have a right to turn you out; go to my ſteward, and if you can ſo explain yourſelf to him, as that he chooſe to permit you to remain, I agree; but, if he order you to depart, you muſt go*," would not this be

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reaſonable. Would this be any puniſhment of the ſtranger? No; it is the right of ſelf-defence. But, as a right to exerciſe this power will not authoriſe the maſter of the houſe wantonly to beat the ſtranger, or violently to take his money from him; ſo a right, to remove an alien from our territory, does not authoriſe a power to puniſh him without a trial by jury.

That aliens, before they can be puniſhed, or deprived of any right, for an offence, muſt be tried by a jury, reſults not from the expreſs words of the conſtitution, which refer not to them, but to citizens. It reſults from this, that our courts know no other mode of trial, and have no authority to adopt any other.

2. But, if this law ſhould not be contrary to the expreſs words, it is objected, that it is contrary to the principles of the conſtitution, which diſtributes the legiſlative, judicial, and executive powers into three departments, while this law confounds them all in the executive; and this, it is ſaid, eſtabliſhes deſpotiſm.

I might reſt the anſwer to this objection, of a confuſion, and accumulation of powers being a violation of the conſtitution, on the obſervation already made, that this law operates upon none, for whoſe benefit the conſtitution was eſtabliſhed, or whom the conſtitution was intended to affect; and cannot, therefore, be a violation of the conſtitution. It operates only on aliens. No citizen has any deſpotiſm to fear from this law. Any citizen may, notwithſtanding this law, plot as many "treaſons, ſtratagems, and ſpoils," as he pleaſes; and, if he can eſcape the judiciary, may bid the preſident defiance.

But, the fact is, there is no confuſion of powers in this law, but ſuch as convenience or neceſſity, conſiſtently with the principles of the conſtitution, introduces into many other laws, to which no man would dream of objecting.

The conſtitution has not eſtabliſhed, and no human conſtitution can eſtabliſh a perfect, but only a modified ſeparation of powers. What work of man is perfect? It is very common, and it is convenient and neceſſary, for the legiſlature to paſs a law fixing certain principles, and leaving it to ſome other part of the adminiſtration, the executive or judiciary, to aſcertain the caſes to which

ſuch principles ſhall be applied, to detail the minute modifications, which no foreſight can ſuggeſt, and experience alone can diſcloſe; or to paſs a law, which ſhall operate on a certain contingency, leaving it to ſome other part of the adminiſtration to declare when this contingency occurs, and the law begins to operate.—This leſſens not the authority of the legiſlature; for ſuch diſcretion cannot be exerciſed by any other part of the adminiſtration, without the authority of the legiſlature; may be reſtrained, corrected or ſuppreſſed, whenever the legiſlature thinks fit; and is, therefore, altogether under the control of the legiſlature. The legiſlature, therefore, only determines ſomething, which it is neceſſary for them to determine; and leaves it to ſome other part of the adminiſtration, as caſes ſhall occur, to determine ſomething elſe reſpecting this, which the limited powers of man, the principles of juſt diſcrimination, and public convenience render it impoſſible for them to determine. Were the legiſlature to take upon them to modify their laws to every caſe, they muſt be conſtantly in ſeſſion; and human capacity would render it impoſſible for any one body of men, to diſcharge their taſk. Therefore the legiſlature wiſely contents itſelf with eſtabliſhing general rules, and leaves, to ſome other part of the adminiſtration, authority to aſcertain the modifications and exceptions. Thus the legiſlative power determines, that certain actions ſhall be puniſhed; but as there may be degrees of ſuch actions, more or leſs aggravated, leaves it to the judiciary to aſcertain the degree of puniſhment; and, as, in ſome caſes, all puniſhment may be diſpenſed with, leaves it to the executive to pardon, at his diſcretion. All this is neceſſary for the ſake of humanity, juſtice, and public convenience; and it ſeems abſurd to ſay, that the principles of the conſtitution are thereby violated.

On ſuch principles this alien act is framed. It eſtabliſhes an authority in the preſident, "*To order all ſuch aliens as he ſhall judge dangerous to the peace and ſafety of the United States, or ſuſpect are concerned in any treaſonable or ſecret machinations againſt the government thereof, to depart out of the territory of the United States.*" But, as a general exertion of this authority may not be neceſſary, it provides, "*That if any alien ſo ordered to*

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3. Leſt this law, when tried by the words, and by the principles, of the conſtitution, ſhould appear unexceptionable, and eſcape cenſure; it has been endeavoured to excite a clamour againſt it, by drawing a melting picture of the diſtreſs of aliens, who may thus be ordered to depart out of the country, at the will of one man.

This is all work of imagination. It cannot be denied, that there is a right in the United States, as in every other nation, to remove aliens; and that there may be caſes, in which the ſafety of the nation will render it neceſſary to exert this right. And, I think, it cannot be denied, that, in the laſt ſeſſion of congreſs, the United States were, if any nation ever was, in a condition that required it as a ſolemn duty, to exert this right. The rights and ſafety of individuals muſt never be put in competition with the rights and ſafety of a nation. Aliens have but an *imperfect* right, the right of hoſpitality and civility, to remain in any nation, to

which they are not bound to permanent allegiance.— And if the rulers of the nation, in which they have a temporary indulgence to reſide, ſuſpect any danger to the nation, from their reſidence, and order them to depart, they have *no* right to remain. The United States were threatened with danger from France, and by the ſame means which France has uniformly adopted, to bring danger and deſtruction on other countries, inteſtine diviſions. Aliens having the leaſt intereſt in the proſperity of this country, and owing the leaſt duty, only a temporary duty, to it, were the moſt likely to yield themſelves the readieſt agents of France. And the little reſpect which, in this country, is paid to the rights of election, gives them, here, an opportunity of miſchief, which they could in no other country enjoy. Though ſome of our own citizens may be baſe enough to yield themſelves as inſtruments of a foreign power, the government of the United States has no authority to remove them. But it has, like every other government, in time of danger, authority to expel aliens; and the right and duty of common defence, and protection againſt invaſion and domeſtic violence, required, that this right of expulſion ſhould be exerted. Nor was the exertion of this right proper only againſt French aliens. The principles profeſſed by the government of France, have excited through the world an enthuſiaſm, which nothing, but experience of their deſtructive conſequences, can correct. There is, in all nations, a number of warm ſpeculative men, combined together, to promote the diffuſion and prevalence of this theoretic liberty. Many of theſe, either expelled or flying from their own country, reſide in the United States; and are, here, it ſeems, ſyſtematically *united*, not in ſupport of the principles of our government, but, of an imaginary political *millennium*, a government which never exiſted, and, while man remains as he is, never can exiſt; in ſupport of the fanciful principles, which, in the progreſs of its revolution to anarchy and deſpotiſm, have brought ſo much miſery on France, and every country, where the arts and arms of France have prevailed. Theſe dogmatiſts, invincible by reaſon or experience, united in principles, however diſperſed in place, as a nation of themſelves,

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are enemies to all governments; and, like the preachers of a new religion, think all other rights and duties ought to yield to the great duty of eſtabliſhing their principles. To this duty they will ſacrifice all other conſiderations; and nothing, however cruel or deſtructive, that can promote this, will, in their eyes, be a crime. Such men will be dangerous to any country, in which they reſide. Inſtigated by the zeal of proſelytiſm, the apparent benevolence in their principles will give them an irreſiſtible influence on the young and inexperienced. And no country, in which ſuch men prevail, can hope for ſafety againſt the arts of France. Nor can any Frenchman more earneſtly promote the views and ſucceſs of France, than any native of any country, who, by adopting her principles, has brought himſelf within the pale of this new political church. Become citizens of the world, they contemn all diſtinctions between nations, and cheriſh all people with equal affection; the love of country is loſt in the love of mankind, and philanthropy extended beyond its natural limits, and exerted beyond its natural force, is waſted in uſeleſs or ſelf-deſtroying efforts. Inſenſible of error, and deaf to inſtruction, they are borne forward with the courage of conſcience, the ardor of inſpiration, and the obſtinacy of impenitence, by an impetuous enthuſiaſm, to all the miſchiefs, which guilt could effect. And, wherever there is no hope of converſion while we are in danger, the exertion of the right of expulſion becomes a duty, which the rulers owe to the ſafety of the nation.

If there may be caſes of humanity, which may make this exertion, where not abſolutely neceſſary, favour of ſeverity; the queſtion is, with whom the power of indulgence may be beſt lodged, ſo as beſt to accompliſh the great object, public ſafety, and moſt to favour humanity.

As a meaſure of national defence, this diſcretion, of expulſion or indulgence, ſeems properly veſted in the branch of the government peculiarly charged with the direction of the executive powers, and of our foreign relations. There is in it a mixture of external policy, and of the law of nations, that juſtifies this diſpoſition.

It was never known, that a numerous and complex body of men had a more tender conſcience, than an

upright individual. Where many do wrong, each can caſt the cenſure from himſelf upon others. But a reſponſible individual muſt take all the burden of the blame. Any man, with any claim to tenderneſs, would rather riſk the ſucceſs of that claim to an impartial and humane individual, than to a numerous body of men. *Dec. Seſſ.* 1798.

It remains, therefore, only to determine, whether the character of the preſident be ſuch, as to render him a proper depoſitary of this power of indulgence. Has the preſident no feelings of humanity? Is a life of piety and juſtice no ground of confidence? The character of the preſident is well known. And no alien, who meddles not with politics and plots, who favours not the views of our enemies, and injures not the peace, ſafety or defence of the Country, has any thing to fear from this law. Even with reſpect to dangerous aliens, congreſs has provided, that the rights of humanity (ſo far as, conſiſtently with the ſupreme law, the ſafety of the people, they can) ſhall be ſecured to them. For it is enacted, *that it ſhall be lawful for any alien, who may be ordered to be removed from the United States, to take with him his property; or, if he leave any of it, that it remain ſubject to his order and diſpoſal.*

But is all our pity to be extended to ſtrangers; and ſhall we extend no care to ourſelves, our wives, and our children? The French have threatened us with pillage, plunder, and maſſacre. Such threats they have carried into execution in other countries. They have threatened us with a party among ourſelves, which will promote their views. Some of them, it is ſaid, have told us, that we dare not reſent their injuries; for there are Frenchmen enow among us, to burn our cities, and cut our throats. And, it ſeems, we dare not remove thoſe gentle lambs! Gracious Heaven! Are we an independent nation, and dare we not do this? Shall our conſtitution, intended as a ſhield to defend, become a ſword to wound us? Have we made a conſtitution, to reſtrain our adminiſtration from oppreſſing ourſelves, and ſo reſtrain it, as to ſubmit our cities to alien incendiaries, and our throats to alien aſſaſſins?

It is no unreaſonable calculation, that there have been, at one time, (and may be now) from twenty to forty

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thouſand French, within the United States. There is alſo a great number of united Iriſh, and fugitives from other countries, notoriouſly diſaffected to their own, to this, and every other government; and devoted to inceſſant revolution. If an invaſion from France were projected, is any thing but arms, organization, and diſcipline wanting, to make all theſe as compleat a French army, as if recruited in France, and tranſported under her banners to the United States? And will any one ſay, that the government of the United States, *which is bound to protect each ſtate againſt invaſion*, is not bound, on a reaſonable fear of invaſion, to remove ſuch internal enemies, before they are armed, organized, or diſciplined?

Vain is all our defence againſt enemies without, if we guard not againſt enemies within. If we leave an Achan in the camp, can we hope for victory? If we leave a band of traitors in the fort, can we hope to defend it? If we ſuffer French ſpies to ſtroll through our cities, our harbours, our ſhores, and our country, and give information of all our ſtrength and all our weakneſs; how can we be guarded againſt attack? If we ſuffer them to remain here, to give information of every ſhip that ſails, that it may fall into the hands of ſome French privateer; how can we protect our trade? If we ſuffer French agents to remain here, to corrupt the minds of our citizens, our printers, and our officers, to pry into our councils, purchaſe our arms and ammunition, influence our opinions and elections, render our people careleſs, and our adminiſtration weak; what have we to expect, but all the horrors of a French invaſion? What have we to expect, but to ſee our houſes in flames, and our families in blood?

I truſt in God, that this will not happen. I truſt, the meaſures adopted by our adminiſtration, with cordial union among ourſelves, will preſerve us from this calamity. But, if it ſhould come upon us, we will curſe thoſe, who have lulled us with a ſweet ſong of ſecurity, and gentle fraternity of the French, who, profeſſing motives of œconomy, have endeavoured to tie up the hands of the adminiſtration from effectual meaſures of defence; and, under the pretence of valuing and ſeeking peace, do, in the ſureſt manner invite war.

We are, at preſent, in a perilous ſtate, and it is to

be feared, on the brink of ſome calamity. Menaced with the reſentment of a foreign nation, we are diſtracted among ourſelves. In proportion to our diſſentions, will be our danger: and our ſafety lies in love to our conſtitution, and confidence in our adminiſtration. If the people will cordially unite in ſupporting active meaſures of the adminiſtration, France will change her tone, from reſentment to complacency. But experience of her conduct towards all other nations muſt convince us, that it is her means only, and not her object, that ſhe will change. Her object will remain the ſame, to reduce us to a ſubjection to her will. Let us beware, therefore, of ſuppoſing, that, when ſhe *ſpeaks* peace, ſhe *means* peace. She will ſpeak peace, while we ſupport our adminiſtration; and again war, whenever ſhe can perſuade our people to oppoſe the adminiſtration of their government. *Divide and ſubdue* is her maxim. *Dec. Seſſ.* 1798.

With a view to leſſen the grounds of diſtruſt in our adminiſtration, ſo fatal to our own intereſt; and to increaſe that confidence in it, ſo eſſential to our ſafety; I have endeavoured, with candour and care, to examine the principles of a law, which has been made a pretext for vehement clamour. I have, I think, ſhewn, that it is conſtitutional and neceſſary. I have ſaid (what is well known) that there is ſuch ground of confidence in the preſident, that there is no fear that he will ſuffer it to operate againſt any alien, who comes and remains honeſtly and innocently among us; and that he will exerciſe his authority only againſt aliens, who uſe the opportunity of their being here, for the purpoſe of diſturbing our peace, alienating the minds of our citizens from our government, betraying our ſituation, corrupting our meaſures, or weakening our defence. And, I hope, it will appear, that, if our rulers had not exerted this authority, we ſhould have had juſt reaſon to ſay, that they had betrayed their truſt.

O! if the people would but love their conſtitution, and confide in its wiſe and honeſt adminiſtration, and turn away from thoſe who harraſs their minds with vain ſuſpicions; how happy might we be! May the God of wiſdom open our eyes to the excellence of our conſtitution, and the purity and prudence of our adminiſtra-

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tion; and to the folly, madneſs, and wickedneſs of thoſe demagogues, who miſlead this people from their intereſts and duties, and glory in their guilt. May he wean us from all partialities and prejudices towards any foreign nation; unite our hearts in love, and ſupport of our government; and preſerve us from the machinations of a government, ambitious, deſperate, faithleſs, and corrupt; which flatters, only to deceive; and careſſes, only to deſtroy.

No. XXVII.

Importance of Public Inſtitutions for Inſtruction.

March Seſſions, 1799.

A REPUBLICAN government on the principles of repreſentative democracy, ſo modified as to ſecure its own preſervation and the welfare of the people living under it, is one of the nobleſt efforts of political ſkill. It is moſt honourable to the author of our nature, and to the pride and dignity of man; providing equally for each a ſtation adequate to his merit; and directing the force of all to the good of all. This is the eſtimate which, in theory, is made of a repreſentative democracy: whether, in practice, it will deſerve this praiſe, will depend on the virtue and wiſdom of the people. Among a wiſe and virtuous people, it may be the beſt, and, among an ignorant and wicked people, the worſt of all forms of government.

In ſcripture, folly is ſynonymous with vice, and wiſdom with virtue. Accordingly virtue is often in proportion to wiſdom, and both are eſſential qualifications of thoſe who are to have any influence in public affairs. Wiſdom depends on talents and experience. Education is a ſyſtem of experience, by which the mind is trained up to wiſdom. Providence has not given to all men equal talents, nor to all of equal talents equal education. Suppoſing, therefore, (what in fact there is not) equality of virtue, there muſt be inequality of wiſdom, and there muſt be ſome men more fit than others for public

ſtation. But, as the permanence of the government, and the welfare of the people, depend on the virtue and wiſdom of the people; and as virtue may be ſaid generally to be in proportion to wiſdom; it becomes the duty of a ſtate, in whoſe government the whole people partake, if it would preſerve its own and its people's welfare, to exert all its means to make its people equally wiſe; ſince it has made them equally powerful.—Equally wiſe it cannot make them, ſince Providence has eſtabliſhed inequality of talents. But, as wiſdom depends alſo greatly on education, a ſtate may, as far as is conſiſtent with other important duties, remove the inequality of education, by affording to all its citizens competent means of inſtruction in the moſt eſſential articles of education. Protection of the body from danger and diſeaſe is not more a duty, than protection of the mind from ignorance and vice.* The importance of the duty is in proportion to the value of the object, and as the mind is more valuable than the body, more ſuſceptible of improvement, and more characteriſtic of our ſpecies, the duty of improving it becomes the more important. *March Seſſ.* 1799.

The monuments of human induſtry, the wall of China, the pyramids of Egypt, the Roman aqueducts and ways, the canal of Languedoc, a city, a palace, a caſtle, or a ſhip, fill the mind with admiration. But human induſtry produces nothing uſeful and great, till it is directed by learning. Nature has not more diſtinguiſhed one ſpecies from another, than education has diſtinguiſhed one man or one nation from another.—Compare a ſavage with a ſage, and you ſeem to contraſt a brute with a man, or a man with an angel. View an Indian hut or canoe, together with an Engliſh palace or ſhip of war, and eſtimate the difference between ignorance and learning! No man or nation ever attained grandeur, without a ſedulous cultivation of learning ſcience and religion. The nation who neglects the eſtabliſhment and cultivation of learning ſcience and religion, neglects the only means of real refinement, proſperity, and happineſs. Among an ignorant people,

* *Vattel, B.* 1. *ſect* 112—3, 129—30.

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there will be no means of discerning truth, detecting falsehood, or preventing misrepresentation; and, if this people live under a democratic form of government, they will be peculiarly unfortunate. Disturbed by the violence of conflicting passions, distracted by the malignity of tempestuous factions, duped by the machinations of ambitious intrigues, and harrassed by the jealousies of ignorance and error, they will be deluded by one falsehood after another, and hurried on from folly to folly, their social state will be miserable, and their government unsteady, fluctuating, ineffectual, and short lived. Without learning and religion, there will not be knowledge and virtue. And without knowledge and virtue, liberty will not be a blessing, but a curse; it will be a sword in the hands of a fool, to wound himself; it will be firebrands, arrows, and death, in the hands of a madman, to cast about in sport.

No duty, therefore, is more incumbent on a government, whose people are free, than to make them wise and good. Without this, liberty will neither be useful nor lasting. In most nations, some institutions for public instruction are maintained at public expence; and, in all, more or less of the burden is left for individual exertion. The concurrence of both seems necessary for an extensive and useful effect. And, I think, no man of any reflection will doubt that public instruction is a public duty, and an important object of government; and that the importance of this object and duty is greater, in proportion as the government is freer. For the instruction of the people ought to be in proportion to their power. In other countries, where power is in the hands of a few, great pains and expence are bestowed, to educate them for the exercise of it. Ought a people, who have the power in their own hands, to spare pains or expence in qualifying themselves for its exercise? Government is established to enforce the welfare of society, and every thing essential or conducing to that, is an essential or important duty of government; though the benefit to many individuals be not immediate, and to some perhaps there be no benefit. If to provide a gaol and a gallows, a judge and an executioner, be a public duty, in order to punish vice; is it not a nobler duty to prevent vice, by enlightening the mind

with knowledge, inſpiring it with the love and eſteem of virtue, furniſhing it with motives to duty, and thus breaking the force of thoſe paſſions, whence ſpring crimes and diſorder? Civilized nations, therefore, have their temples and their colleges, their prieſts and their preceptors. In Sparta, the children were conſidered as the property of the ſtate, and educated by the public care, at the public charge. Among the Jews, whoſe civil polity was dictated from Heaven, a whole tribe were dedicated to the cultivation of religion, and the ſcience of their laws, were exempted from the ſervice of war, maintained by ſtated contributions of the whole nation, and had no peculiar inheritance allowed them among the other tribes. In Greece and in Rome, religion was cultivated by public eſtabliſhments, and philoſophers devoted their time and their ſcience to the education of youth, and received high rewards. In modern Europe, religion has every where been maintained at public expence, and univerſities, colleges, academies, and other ſchools have been occaſionally founded and endowed, and regularly ſupplied with learned profeſſors and maſters, paid by ſalaries annexed to the inſtitutions. In the ſmall kingdom of Scotland, beſides many ſchools ſupported by private foundations, many private lectures and ſchools, depending for ſupport on the ſcholars, there are five univerſities, and nearly a thouſand ſchools, ſupported by eſtabliſhed funds and filled with maſters.* The benefit of thoſe inſtitutions is well ſhewn, in the character and acquirements of the people of that country. *March Seſſ.* 1799.

In America, the diverſity of opinion, and a zeal for liberty, more excuſeable than intelligent, have generally prevented or diſcouraged public inſtitutions of this kind, and ſubmitted inſtruction, in religion and literature, to the diſcretion of individual liberality or intereſt. Yet, in ſome ſtates, public inſtruction, both in religion and literature, is put under the protection of government, and without violation of the rights of conſcience and freedom of will, regulated by law, and ſupported by public authority. The ſtates, in which theſe inſtitutions

* *Every pariſh has at leaſt one pariſh church and miniſter, and a pariſh ſchool, ſupported by a kind of land tax.*

March Seſſ. 1799. prevail, are the wiſeſt, and the beſt governed; and to them may be attributed the general prevalence of piety, knowledge, and rational liberty in thoſe New England ſtates.

It were happy for other ſtates, if, by means of ſimilar inſtitutions, ſimilar effects could be produced. In the territory of the United States, weſt of the Ohio river, congreſs directed, that, in ſurveying the townſhips of ſix miles ſquare, there ſhould be reſerved, in the centre of each townſhip, a tract of two miles ſquare. Thoſe reſervations may be happily improved to the ſalutary purpoſe of public inſtruction.

The conſtitution of Pennſylvania has directed the legiſlature, to "provide by law for the eſtabliſhment of ſchools throughout the ſtate, in ſuch manner, that the poor may be taught *gratis*."* Either from parſimony, peculiarly cenſurable when indulged to defeat an uſeful purpoſe, or from the difficulty of combining in one direction the opinions of many, or from ſome perplexity in the ſubject; only ſome feeble attempts have been made, to comply with this important injunction of the conſtitution. It yet remains, therefore, unexecuted; and to every man who has reflected on the value of the object, will be a ſtanding monument, that the exerciſe of the powers of government ought to be accompanied with wiſdom. To delay the eſtabliſhment of theſe inſtitutions, till every man, or perhaps the people generally, underſtand their importance, and approve their eſtabliſhment, will be to delay paſſing the river, till all the water run down, or to delay adminiſtering the medicine, till the diſeaſe be removed. Oppoſition to ſuch inſtitutions generally reſults from ignorance; and ignorance cannot be removed without ſuch inſtitutions. The wiſer part of the ſtate ought to unite their exertions, to promote inſtitutions for public inſtruction: when their effects are felt, they will be valued; and the fogs and darkneſs of oppoſition will flee before the riſing ſun of ſcience.

But, if it ſhould be thought imprudent to attempt the introduction of theſe inſtitutions, on an extenſive ſcale at once, no opportunity ought to be omitted of pro-

* *Art. vii. ſec.* 1.

moting their eſtabliſhment by degrees. Every ſtep made in the progreſs ſhortens the diſtance to the end.— Every new inſtitution for public inſtruction takes from the dominion of ignorance, and leſſens the oppoſition to eſtabliſhing thoſe inſtitutions on a great and general plan. Every advantage gained by ſcience weakens its enemy; and, if it cannot ſcale the walls of ignorance, it may gradually undermine their foundation. *March Seſſ.* 1799.

In the ſupport given to the univerſity in Philadelphia, to the college in Carliſle, and to ſeveral other inſtitutions of inferior note, ſomething has been done to promote the views of the conſtitution. The college of Carliſle has proved itſelf peculiarly uſeful, and well deſerving the patronage of the government. Other inſtitutions, when their funds become active, will, it may be hoped, contribute to the diffuſion of knowledge, the ſtability of government, the preſervation of liberty, and the improvement of ſociety. Let the legiſlature, therefore not ſtop, but, until they can accompliſh the great plan of a general eſtabliſhment of inſtitutions for public inſtruction, let them ſeize every favourable occaſion of making partial eſtabliſhments, which will gradually leſſen the great work to be accompliſhed, and facilitate the way to a general ſcheme.

A favourable occaſion now offers itſelf to the legiſlature of eſtabliſhing uſeful inſtitutions, in ſome parts of an extenſive country, which will ſoon be divided into five or ſix counties; and which, as it moſt needs, is leaſt able to procure the means of inſtruction. At Preſqu'ile, at Le Bœuf, and at the mouth of French creek, of Conewango, and of Beaver creek, tracts of land were reſerved, and towns laid out, for the uſe of the ſtate. Some part of each has been ſold, and ſome remains unſold. If the legiſlature would incorporate truſtees of an academy, at each of thoſe towns, and endow them ſeverally with the unſold part of thoſe tracts, uſeful foundations might thus be eſtabliſhed at very little coſt to the ſtate. It can be no objection to this plan, that the ſtate has not land, to provide, in this manner, for other parts of its territory. This land, divided among all the counties, would be altogether inſignificant; and the ſtate has already given to inſtitutions of this kind, in ſome counties, larger donations than this, while, in other

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In forming new counties, opportunities will occur, without any eventual expence to the ſtate, of making uſeful proviſion for a public ſchool in each county town. If truſtees for that purpoſe were incorporated, and enabled by law, and by a loan of money from the ſtate, to purchaſe a quantity of land for a town and outlots; the ſale of the lots, with proper reſervations for public purpoſes, would enable the truſtees to repay the money lent, and to lay an uſeful foundation for a public ſchool.

Thoſe county ſchools might be nurſeries for ſupplying townſhip ſchools with qualified maſters; and thus, and by a general ſuperintendance, might bring the ſyſtem of education to an uniform and improved ſtate.

It is a melancholy proſpect, and gives but poor hopes of the riſing generation, to ſee in what hands the education of youth in this country generally is. Any man, fit for nothing elſe, thinks himſelf fit for being a ſchoolmaſter, and parents generally have no choice, and muſt be content with any one that offers. To remedy this evil, which all muſt allow to be great, a proſpect of permanency and profit muſt be given to the inſtructors of youth, that will juſtify and reward the exertion of competent qualifications, and render the ſtation of a ſchoolmaſter reſpectable. This cannot be done, except perhaps in cities and populous towns, without the aid of government: In the country generally, there will be ſuch diverſity of opinion, ſuch caprice of parents, and ſuch thinneſs of population, as will defeat all hope of procuring reſpectable or uſeful ſchoolmaſters. A man qualified for this important ſtation will find, in many others, a better reward for his induſtry. Were the reward competent, his ſtate will be continually imbittered by the dependence, in which a temporary engagement, and caprice and partiality of parents, will place ſuch a ſchoolmaſter, if, in doing his duty, he deſires to avoid giving offence. This will alſo prevent that ſalutary diſcipline, ſo neceſſary to education, and will foſter, by indulgence, violent paſſions deſtructive of peace. To

remedy theſe evils, and promote the uſeful and general inſtruction of youth, public authority muſt eſtabliſh funds, to aid individual exertions. Schools will thus be more numerous and permanent; maſters better qualified; parents, leſs arbitrary, will be better pleaſed; and youth better inſtructed. In this country, at preſent, if a man can but read, write, and cypher, he is conſidered as well educated, and fit for any office; and a tolerable education, for one ſon, much leſs for many, cannot be obtained, but at an expence which few parents can afford. Hence we often ſee offices, and even the learned profeſſions, occupied by men of an education very inadequate to their ſtation. This is injurious to our intereſts: it renders offices contemptible, and profeſſions ſordid. No nation can ever be reſpectable, while offices and profeſſions are ſo occupied; and it is incumbent on the ſtate, to wipe off this ſtain on its reputation. *March Sess.* 1799.

Some may ſay, that thoſe only who have children ſhould maintain ſchools.

This is a burden to which they are generally not competent. Where any thing, which ought to be done, cannot be done by the individual exertions of thoſe immediately intereſted, it becomes the duty of the ſtate to do it; for it reſults from the nature of a ſociety, that the burdens of each ſhould be borne by all. Ignorance is a public evil, and, like other public evils, muſt be removed at public expence. Inſtruction is a public bleſſing, contributing to the general peace and proſperity of the country. Every man of education adds to the ſtock of wiſdom and experience; and, more than wealth, promotes the improvement of the country. By inſtruction, to eradicate or correct dangerous paſſions is as much a public duty, as to reſtrain a madman or robber, or to guard againſt the ravages of fire. Objections, of the kind now ſuppoſed, would defeat all the purpoſes of ſociety and government. Were ſuch objections to prevail, no money would be raiſed for a court-houſe; for many would ſay, "We never go to law, let thoſe who uſe it build a court-houſe." In like manner, there would be no roads, no bridges, and no public officers; for great part of the expence of theſe muſt be collected from men, to whom they are of no peculiar or immediate benefit. It is only becauſe we have not

March Seſſ. 1799. been accuſtomed to inſtitutions for public inſtruction ſupported, more or leſs, at public expence, that we object to this manner of ſupporting them, more than any other public benefit. After experience of their utility, all good men would cheerfully contribute to their maintenance. They are proper objects of the care of government, and the conſtitution has expreſsly ſanctioned and enjoined them. It is, therefore, the duty of the legiſlature, to proceed, without delay, in the moſt prudent and uſeful manner, to their eſtabliſhment. Nothing will have a more happy tendency to preſerve our liberty and our government: for theſe will never be ſafe or uſeful, while ignorance or vice prevails among our people; and theſe will prevail, till inſtitutions for public inſtruction are cheriſhed by the government.

With a hope, that theſe Sentiments may make a favourable impreſſion, I refer them to ſerious conſideration; and turn to our immediate and peculiar duties.

FINIS.